NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 44 | Issue 1 Article 6

January 2000

GOULD DEBUNKED: THE PROHIBITION AGAINST USING NEW YORK'S FREEDOM OF INFORMATION LAW AS A CRIMINAL DISCOVERY TOOL

William Tesler

GOULD DEBUNKED: THE PROHIBITION AGAINST USING NEW YORK'S FREEDOM OF INFORMATION LAW AS A CRIMINAL DISCOVERY TOOL

WILLIAM TESLER*

* J.D., New York Law School, 1995; B.A., John Jay College of Criminal Justice, City University of New York, 1991. The author is the Special Assistant Counsel to the Deputy Commissioner for Legal Matters, of the New York City Police Department, and has been designated a Special Assistant Corporation Counsel for the City of New York. From March of 1996 to December of 1999, he was a Deputy Managing Attorney in the Police Department's Legal Bureau, in charge of defending the agency in litigation arising under New York's Freedom of Information Law. In that capacity he has handled or supervised over 300 N.Y. C.P.L.R. Article 78 proceedings, and has been of counsel in several related appeals. The views expressed in this article are those of the author and do not necessarily represent those of the New York City Police Department or the City of New York.

PREAMBLE

New York's Freedom of Information Law, like its federal counterpart, the Freedom of Information Act, is designed to provide the public with access to government records, within a framework that allows for denial of that access where a record falls within any of a handful of specified exemptions. It has been this author's experience, however, that all too much confusion abounds regarding the operation of the statute, sometimes resulting in wasteful litigation at the expense of taxpayers and private parties alike, and sometimes resulting in a dangerous failure to assert or even recognize an appropriate exemption in a given case. Following the 1996 Court of Appeals decision cited in the title of this article, that confusion has taken a turn for the worse, it seems, and has given rise to the problems and concerns described hereunder.

This article is thus presented in an attempt to shed light on a sometimes difficult subject. It is hoped that the analysis it contains will become a useful resource, both to the government attorneys charged with defending against the inappropriate—and sometimes dangerous—disclosure of records, as well as to the busy judges who must preside over such proceedings. It is also hoped that this article will prove useful to potential litigants in such cases and to their counsel, since a better understanding of this area of law may help to ensure that only truly meritorious claims reach the courthouse. It is presented, additionally, to provide an overview of one of the more contentious issues arising under the Freedom of Information Law, and one which has long called for guidance. Fortunately, that guidance exists—one just needs to know where to look for it.

One additional point must be made regarding the title of this article: "*Gould* Debunked." Like the name of the statute with which we are herein concerned, the Freedom of Information Law, this article's title is somewhat of a misnomer. Contrary to what its name suggests, the Freedom of Information Law does not provide access to "information," but to records (there *is* a difference). Similarly, the title of this article is not meant to suggest that the Court's decision in *Gould* needs to be debunked. To the contrary, as will be shown, it is the frequent misinterpretation of *Gould* which requires the debunking. Hopefully, this article accomplishes that goal.

I. INTRODUCTION

New York's Freedom of Information Law ("FOIL")[1] imposes upon governmental agencies a broad duty of disclosure regarding agency records. Accordingly, all agency records are presumptively available for disclosure to the public unless they fall within one of ten enumerated exemptions.[2] Thus, in a CPLR Article 78 proceeding[3] to compel production of records where, based upon one of those exemptions, the agency has denied access to records reasonably described in a written

1. N.Y. PUB. OFF. LAW §§ 84 et seq. (McKinney 1988).

2. *See* N.Y. PUB. OFF. LAW § 87(2). This subdivision provides that an agency may deny access to records or portions thereof that:

(a) are specifically exempted from disclosure by state or federal statute;

(b) if disclosed would constitute an unwarranted invasion of personal privacy under the provisions of subdivision two of section eighty-nine of this article;

(c) if disclosed would impair present or imminent contract awards or collective bargaining negotiations;

(d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of the subject enterprise;

(e) are compiled for law enforcement purposes and which, if disclosed, would:

i. interfere with law enforcement investigations or judicial proceedings;

ii. deprive a person of a right to a fair trial or impartial adjudication;

iii. identify a confidential source or disclose confidential information relating to a criminal investigation; or

iv. reveal criminal investigative techniques or procedures, except routine techniques and procedures;

(f) if disclosed would endanger the life or safety of any person;

(g) are inter-agency or intra-agency materials which are not:

i. statistical or factual tabulations or data;

ii. instructions to staff that affect the public;

iii. final agency policy or determinations;

iv. external audits, including but not limited to audits performed by the comptroller and the federal government; or

(h) are examination questions or answers which are requested prior to the final administration of such questions.

(i) are computer access codes.

(j) are photographs, microphotographs, videotape or other recorded images prepared under authority of section eleven hundred eleven-a of the vehicle and traffic law [Eff. until Dec. 1, 2004].

3. *See* N.Y. C.P.L.R. 7801 et seq. (McKinney 1994).

FOIL request, the agency bears the burden in that proceeding of proving entitlement to any applicable FOIL exemption.[4] Although FOIL is in part predicated upon the public's right to access,[5] the Legislature's incorporation of these ten exemptions into the statute is based upon its recognition of the dangers and injustices that absolute access to government records may entail, and the policies underlying them are equally important to the sound governance and protection of society.[6] These policies are of special concern to law enforcement agencies, because the nature of law enforcement often involves such agencies—more so than most—with sensitive and confidential records, such as those created pursuant to a criminal investigation.

On November 26, 1996, New York's Court of Appeals rendered its decision in *Gould v. New York City Police Department*,[7] holding that a particular New York City Police Department ("NYPD") form, known as a Complaint Follow-Up Report (also known in the NYPD lexicon as a "DD5," this form is the principal instrument utilized by NYPD investigatory personnel to record the progress of police investigations), was not entitled to "blanket" protection under one of FOIL's enumerated exemptions.[8] As the Court explained, "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government."[9] However the Court also briefly addressed, in dicta, another of FOIL's

4. *See* Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 496 N.E.2d 665, 667 (1986) (citations omitted) ("[T]he agency seeking to prevent disclosure carries the burden of demonstrating that the requested material falls squarely within a FOIL exemption . . ."); *see also* Laureano v. Grimes, 179 A.D.2d 602, 603, 579 N.Y.S.2d 357, 358 (1st Dep't 1992). Parallel citations to New York official reporters have been inserted at the request of the author, who intends this article to be a resource for New York practitioners and courts, as well as legal scholars.

5. *See* N.Y. PUB. OFF. LAW §§ 84, 89(4)(b).

6. *See, e.g.*, Fink v. Lefkowitz, 47 N.Y.2d 567, 571, 393 N.E.2d 463, 465 (1979) ("While the Legislature established a general policy of disclosure by enacting [FOIL], it nevertheless recognized a legitimate need on the part of government to keep some matters confidential."); Floyd v. McGuire, 87 A.D.2d 388, 390-91, 452 N.Y.S.2d 416, 417-418 (1st Dep't 1982) (the legislative policy underlying FOIL's exemptions must be given equal consideration as that given to the policy underlying disclosure); Delaney v. Del Bello, 62 A.D.2d 281, 405 N.Y.S.2d 276 (2d Dep't 1978) ("Sensitivity to the public's right to know [under FOIL] . . . should not and cannot be permitted to eclipse the realization that government functioning involves a healthy mixture of practicality. Too healthy a dose of disclosure could bring the wheels of government to a grinding halt.").

7. 89 N.Y.2d 267, 675 N.E.2d 808 (1996).

8. *See Gould*, 89 N.Y.2d at 275, 675 N.E.2d at 812.

9. *Id.*

exemptions—one which precludes disclosure where records are otherwise "specifically exempted from disclosure by state or federal statute" (hereinafter, the "Statutory Exemption").[10] There the Court noted, simply, that Criminal Procedure Law Article 240 (which governs the criminal discovery process)[11] is not a statute which falls within that exemption.

Although entirely tangential to the issues before the Court, this dicta has, to a great extent, overshadowed the actual holding in *Gould* and has been propelled into the consciousness of the defense bar, some of whom have attempted to portray it as sanctioning the unfettered use of FOIL—through records requests made to prosecutors, police departments, or other law enforcement agencies—to circumvent the Criminal Procedure Law's restrictions on criminal discovery. The "campaign" for this interpretation has been mounted despite the absence of any language in the dicta (or anywhere else in the decision) which might appear to justify it, and despite the existence of another FOIL exemption which clearly has direct application to requests for records implicated in a criminal discovery context. Found at New York Public Officers Law section 87(2)(e), this additional exemption pertains to records which are compiled for law enforcement purposes which, if disclosed, would result in any of four prescribed dangers (hereinafter, the "Law Enforcement Exemption"). One of those dangers, enumerated at section 87(2)(e)(i), emerges where disclosure would interfere with law enforcement investigations or judicial proceedings (the "interference provision" of the Law Enforcement Exemption; hereinafter, the "Interference Exemption").

But, until recently, little clear appellate guidance as to the Interference Exemption's application in response to attempts at using FOIL as a discovery tool has emerged in the three-plus years since *Gould* was decided.[12] This may be, in large part, due to the fact that discovery-

10. 89 N.Y.2d at 275, 675 N.E.2d at 812.

11. *See* N.Y. CRIM. PROC. LAW §§ 240.10, et seq. (McKinney 1993).

12. *See* Pittari v. Pirro, 179 Misc. 2d 241, 683 N.Y.S.2d 700 (Sup. Ct. 1998), *aff'd* 258 A.D.2d 202, 696 N.Y.S.2d 167 (2d Dep't 1999), *leave denied*, 94 N.Y.2d 755, 723 N.E.2d 567 (1999) (where, prior to affirmation by the Second Department, Supreme Court had observed that none of the reported appellate cases dealing with FOIL had addressed the applicability of N.Y. PUB. OFF. LAW § 87(2)(e)(i)—the Interference Exemption—to a pending criminal prosecution). The Second Department's 1999 affirmation of *Pittari* constitutes the first appellate precedent directly on point as to this issue. *Accord*, Legal Aid Soc'y v. New York City Police Dep't, 713 N.Y.S.2d 3 (1st Dep't 2000), *appeal denied*, 2000 N.Y. LEXIS 3925 (N.Y. Dec. 21, 2000) (where the

type records are ultimately obtained anyway under Criminal Procedure Law Article 240 either before a FOIL request proceeds to the litigation stage, during the pendency of FOIL litigation (thereby rendering the dispute moot),[13] or prior to the need for either party to appeal an adverse decision in a FOIL case. Moreover, the general requirement of making a *particularized showing* in order to meet the burden of proof for withholding records under the exemption[14] may be perceived as requiring an agency resisting disclosure to prove—separately for each paragraph of each document—that disclosure would cause a specific harm, short of which no relief from disclosure may be had.[15] Although that perception as to FOIL's burden may have had its own part in discouraging agencies from even attempting to properly avail themselves of this important exemption,[16] any such perception is sorely misplaced. In fact, as will be shown, nothing could be further from the truth.

This article will demonstrate that, based upon FOIL's legislative history as a parallel statute to its federal counterpart, the Freedom of Information Act ("FOIA"),[17] both FOIA's case law and its own legislative history apply to FOIL as well. This connection is especially salient as to the Interference Exemption[18] contained in both statutes, in

---

court, inter alia, concurred with *Pittari* as to this issue). *See also infra* notes 328-30, 333 and accompanying text; *cf.* Sideri v. Office of the District Attorney, 243 A.D.2d 423, 663 N.Y.S.2d 206 (1st Dep't 1997) (where the court *touched on* the applicability of that exemption to a pending criminal appeal); *see also infra* note 332 and accompanying text.

13. *See, e.g.*, Pordum v. Nyquist, 42 N.Y.2d 958, 367 N.E.2d 647 (1977); Newton v. Police Department of New York, 183 A.D.2d 621, 624, 585 N.Y.S.2d 5, 8 (1st Dep't 1992) (where the relief sought is obtained during the pendency of an Article 78 proceeding, that proceeding is moot).

14. *See infra* Part IV.C.2 for discussion as to the particularized showing requirement.

15. *See infra* notes 328-30 and text accompanying note 204 (Congress's rejection of this perception under FOIL's federal analogue, the Freedom of Information Act, 5 U.S.C. § 552 (1994)); *see also Pittari*, 179 Misc. 2d at 241, 683 N.Y.S.2d at 700.

16. New York State Assembly Bill number A-6131, which had been urged by the New York District Attorney's Association, and was introduced by Assemblypersons Seaman and Wirth in 1997, sought to protect DD5s and police officers' memo books from disclosure under FOIL, pending the termination of a criminal proceeding. The bill's conception was apparently based upon the concern that *Gould* had done away with the only "clear cut" avenue of protecting such records in a pre-discovery context.

17. *See supra* note 15.

18. Unless otherwise noted, this term will be used to describe the FOIL provision found at N.Y. PUB. OFF. LAW § 87(2)(e)(i). Where it is used in reference to the corresponding FOIA provision, that reference will be made clear.

that Congress's amendment of FOIA's version of that exemption was followed shortly thereafter, in virtual lockstep, by New York's amendment to FOIL's corresponding provision (as will be seen, that FOIL's version adhered closely to both the language and structure of its FOIA analogue indicates a strong legislative intent to mirror the function and purpose of FOIA's version of the exemption). This article will then provide an analysis of the cases construing FOIA's Interference Exemption, and will further demonstrate that it is well settled that the use of FOIA—and therefore of FOIL—as a discovery tool in a criminal proceeding[19] is exactly the type of interference contemplated by both versions of the exemption and is impermissible where the exemption has been raised. Finally, this article will set forth the actual nature of the ill-defined and often misunderstood evidentiary standard required to sustain an exemption under FOIL and, further, will demonstrate that the proffer of generic "categories" of both harm as well as of records suffices to meet that standard under the Interference Exemption.

II. THE MECHANICS OF FOIL: A BRIEF PRIMER

FOIL directs that, within five business days of receiving a written request for a record reasonably described,[20] an agency subject to FOIL's provisions[21] shall either: 1) make such record available to the requestor; 2) deny the request, in writing; or 3) furnish a written acknowledgment of the receipt of the request, inclusive of a statement of the approximate

---

19. Although the same analysis applies with equal force to *any* judicial proceeding. *See infra* notes 218 & 241 and accompanying text.

20. *See* N.Y. PUB. OFF. LAW § 89(3); Konigsberg v. Coughlin, 68 N.Y.2d 245, 501 N.E.2d 1 (1986) ("the requirement . . . that documents be 'reasonably described' was to enable the agency to locate the records in question" citing, with approval, National Cable Tel. Ass'n v. Federal Communications Comm'n, 479 F.2d 183, 192 (D.C.C. 1973) for the proposition that a "plausible claim of nonidentifiability . . . may be presented where agency's indexing system was such that 'the requested documents could not be identified by retracing a path already trodden.'" *Accord* Wattenmaker v. N.Y.S. Employees' Retirement Sys., 95 A.D.2d 910, 464 N.Y.S.2d 52 (3d Dep't 1983); Gannett Co. v. James, 86 A.D.2d 744, 447 N.Y.S.2d 781 (4th Dep't 1982); *cf.* M. Farbman & Sons v. New York City Health and Hosps. Corp., 62 N.Y.2d 75, 464 N.E.2d 437 (1984); Mitchell v. Slade, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep't 1991).

21. "'Agency' means any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." N.Y. PUB. OFF. LAW § 86(3).

date upon which the request will be granted or denied.[22] Failure of the agency to timely respond to an initial FOIL request, as set forth above, may be deemed a constructive denial, thus triggering the requestor's right to file an administrative appeal.[23] Assuming that the requested record exists and can be located, and that access thereto has not been otherwise denied, the agency must provide access to the requested record upon payment of the prescribed fee[24] and, if requested to do so, must certify to its correctness.[25] Where applicable, the agency must certify that it does not possess the requested record, or after a diligent search that the record cannot be located.[26] Except for those specified records which FOIL itself requires the agency to create and maintain,[27] the agency is not required to prepare records which it does not possess or cannot

22. *See id.*

23. *See* N.Y. PUB. OFF. LAW § 89(4)(a); *see, e.g.*, DeCorse v. City of Buffalo, 239 A.D.2d 949, 950, 659 N.Y.S.2d 604, 605 (4th Dep't 1997); Floyd v. McGuire, 87 A.D.2d 388, 390-91, 452 N.Y.S.2d 416, 417-18 (1st Dep't 1982). Note that, where the agency *does* timely respond to a request for records by providing an estimate of the approximate date upon which it will determine whether to grant or deny access, *see* N.Y. PUB. OFF. LAW § 89(3), regulations which seek to place a limit on that estimate have been held invalid as inconsistent with FOIL. *See* Lecker v. New York City Bd. of Educ., 157 A.D.2d 486, 549 N.Y.S.2d 673 (1st Dep't 1990), *appeal dismissed*, 75 N.Y.2d 946, 554 N.E.2d 1280 (1990); *accord* Legal Aid Soc'y v. New York City Police Dep't, 713 N.Y.S.2d 3 (1st Dep't 2000), *appeal denied*, 2000 N.Y. LEXIS 3925 (N.Y. Dec. 21, 2000).

24. *See* N.Y. PUB. OFF. LAW § 89(3). The statute provides for a maximum fee of twenty-five cents per page, though nothing in that provision precludes the agency from waiving the charge. Note that the provision also specifies that access to records be granted upon the requestor's "offer to pay." But the Committee on Open Government has expressed the opinion that it is appropriate, at least in the context of a request involving numerous records, for the agency to require payment in advance. *See* Committee on Open Gov't, Advisory Op. No. 7201 (June 19, 1992), issued to Kevin A. Luibrand.

25. *See* N.Y. PUB. OFF. LAW § 89(3).

26. *Id; see also infra* notes 67-78 and accompanying text (discussion of FOIL's certification requirement). As to the requirement to search for a requested record, the requirement is, of course, limited to the extent that the record is sufficiently reasonably described, so as to allow for a search based upon the agency's record-keeping system. *See supra* note 20. Based upon this criteria it is axiomatic that "secondary searches"–i.e., searches for additional records which the requestor may seek, that only come to light based on references in the records initially retrieved – are not required under FOIL. *See* Wattenmaker v. NYS Employees' Retirement Sys., 95 A.D.2d 910, 464 N.Y.S.2d 52 (3d Dep't 1983) (responding agency not required to perform petitioner's research and investigation).

27. *See* N.Y. PUB. OFF. LAW §§ 87(3), 88(3).

locate.[28] Additionally, FOIL does not apply to requests for physical evidence,[29] nor does it require the agency to provide answers to interrogatories.[30] Moreover, a requestor's failure to respond to an agency's solicitation for additional information required to address the request is properly deemed an abandonment of the request.[31]

Although a record may be exempt from disclosure under FOIL an agency may, nevertheless, disclose that record, in whole or in part, as a matter of discretion.[32] Should the agency deny a FOIL request, it is required to do so in writing.[33] FOIL does not require the agency, at this stage, to explain the denial but only to certify[34] that it does not possess the requested record or, pursuant to a diligent search, that the record

---

28. N.Y. PUB. OFF. LAW § 89(3); Curro v. Capasso, 209 A.D.2d 346, 619 N.Y.S.2d 549 (1st Dep't 1994); Ahlers v. Dillon, 143 A.D.2d 225, 532 N.Y.S.2d 22 (2d Dep't 1988).

29. *See, e.g.*, Allen v. Strojnowski, 129 A.D.2d 700, 700-01, 514 N.Y.S.2d 463, 464-65 (2d Dep't 1987); Sideri v. New York District Attorney, 243 A.D.2d 423, 663 N.Y.S.2d 206 (1st Dep't 1997).

30. *See, e.g.*, Guerrier v. Hernandez-Cuebas, 165 A.D.2d 218, 219, 566 N.Y.S.2d 406, 407 (3d Dep't 1991); Gabriels v. Curiale, 216 A.D.2d 850, 851, 628 N.Y.S.2d 882, 883 (3d Dep't 1995) (cases holding, generally, that FOIL does not require an agency to compile information it does not already possess in the form sought, for the purposes of complying with a FOIL request).

31. *See, e.g.*, Timmons v. Records Access Officer, 271 A.D.2d 320, 706 N.Y.S.2d 640 (1st Dep't 2000) (Supreme Court's dismissal of petition seeking records under FOIL affirmed, in that "[p]etitioner failed to meet his burden to supply the information required to retrieve the requested documents"); Thomas v. New York Police Department, No. 402907/98, Decision and Order (Sup. Ct. N.Y. County October 30, 1998) (Article 78 petition dismissed for lack of subject-matter jurisdiction, where requestor had failed to supply additional information that the agency had solicited as necessary to processing his FOIL request); *accord* Mitchell v. Slade, 173 A.D.2d 226, 569 N.Y.S.2d 437, *leave denied* 78 N.Y.2d 863, 586 N.E.2d 60, 578 N.Y.S.2d 877 (1991) (holding that a requestor of records bears the threshold burden under FOIL to reasonably describe the records sought such that they can be located by the agency, and that the solicitation of additional information in order to assist the requestor in making the request is not even within the agency's duty).

32. *See* Hanig v. New York Dep't of Motor Vehicles, 79 N.Y.2d 106, 109, 588 N.E.2d 750, 752-53 (1992) (*citing* Capital Newspapers v. Burns, 67 N.Y.2d 562, 567, 496 N.E.2d 665, 668 (1986)).

33. *But see* DeCorse v. Buffalo, 239 A.D.2d 949, 950, 659 N.Y.S.2d 604, 605 (4th Dep't 1997) (failure to timely respond to a FOIL request within the allotted period is deemed a constructive denial, thus triggering the requestor's right to take an administrative appeal).

34. *See* N.Y. PUB. OFF. LAW § 89(3); *see also infra* notes 67-78 and accompanying text (the limits of FOIL's certification requirement).

cannot be located, if either is applicable.[35] Thus, where a denial is based upon an enumerated exemption, nothing in the statute requires the agency, initially, to specifically say so (although it appears that most agencies do). Upon denial (for any reason) by the agency, the requestor may submit an administrative appeal, either to the agency head or to the person designated to consider such an appeal[36] (the "Appeals Officer") within thirty days of the date of the denial.[37] Failure to timely appeal a denial of records under FOIL will not only result in forfeiture of the right to appeal, but will also preclude subject-matter jurisdiction if the requestor then attempts to seek judicial review of the denial.[38] Failure of the designated Appeals Officer to respond to an appeal within ten business days of receipt,[39] however, may be deemed a constructive final denial upon which the requestor, having thus exhausted FOIL's

35. *See supra* note 26 and accompanying text.

36. Note that in Barrett v. Morgenthau, 74 N.Y.2d 907, 548 N.E.2d 1300 (1989), the Court of Appeals held that the respondent's failure both to advise the requestor—who had made his initial FOIL request to the agency head—of the availability of an administrative appeal procedure, and to demonstrate to the court even the existence of an administrative appeal procedure under FOIL, required the denial of the respondent's dismissal motion which had included a claim that the petitioner had failed to exhaust FOIL's administrative remedies. The requirement to inform a requestor of appeal procedures was based upon the Rules of the Committee on Open Government, 21 NYCRR 1401.7(b). However, the Rules of the Committee on Open Government have since been held invalid where they impose requirements not otherwise required by FOIL itself. *See* Lecker v. New York City Bd. of Educ., 157 A.D.2d 486, 549 N.Y.S.2d 673 (1st Dep't 1990), *appeal dismissed*, 75 N.Y.2d 946, 554 N.E.2d 1280 (1990); *accord* Legal Aid Soc'y v. New York City Police Dep't, 713 N.Y.S.2d 3 (1st Dep't 2000), *appeal denied*, 2000 N.Y. LEXIS 3925 (N.Y. Dec. 21, 2000). Thus, as long as the agency has indeed established a bona fide administrative appeal procedure, *Lecker* appears to have rendered *Barrett* irrelevant. *See* Van Steenburg v. Thomas, 242 A.D.2d 802, 661 N.Y.S.2d 317 (3d Dep't 1997); DeCorse v. City of Buffalo, 239 A.D.2d 949, 659 N.Y.S.2d 604 (4th Dep't 1997); Floyd v. McGuire, 87 A.D.2d 388, 452 N.Y.S.2d 416 (1st Dep't 1982).

37. N.Y. PUB. OFF. LAW § 89(4)(a). The author is the Appeals Officer for the New York City Police Department.

38. *See* Reubens v. Murray, 194 A.D.2d 492, 599 N.Y.S.2d 580 (1st Dep't 1993); Murphy v. New York State Educ. Dep't, 148 A.D.2d 160, 164-65, 543 N.Y.S.2d 70, 73 (1st Dep't 1989). *But see* Malerba v. Kelly, 211 A.D.2d 479, 621 N.Y.S.2d 318 (1st Dep't 1995); Newton v. Police Dep't of City of New York, 183 A.D.2d 621, 624, 585 N.Y.S.2d 5, 8 (1st Dep't 1992) (in view of the respondents' laxity in not addressing a petitioner's FOIL request until after commencement of an Article 78 proceeding, the court permitted the petitioner to take an administrative appeal from a partial denial of records despite the lapse of the 30-day administrative appeal period under N.Y. PUB. OFF. LAW § 89 (4)(a)).

39. N.Y. PUB. OFF. LAW § 89(4)(a).

administrative remedies,[40] may pursue an Article 78 proceeding to compel disclosure.[41] Of course, an actual written denial of an appeal, as provided for by the statute, will also confer jurisdiction in an Article 78 proceeding.[42] Moreover, it is only upon such written denial by the Appeals Officer that any explanation is directed by FOIL, which requires the agency to "fully explain" the reasons for denial of the administrative appeal.[43] Finally, the Appeals Officer must forward to the Committee on Open Government copies of both the appeal and the determination thereon.[44]

Note that it is the date of the letter of denial on appeal,[45] or the date of the constructive denial (i.e., the tenth business day after the agency receives an appeal letter),[46] which commences the statute of limitations period of four months[47] within which to bring an Article 78 proceeding. It should be pointed out that requestors have sometimes been known, after a failure to timely appeal a denial of a FOIL request, to make the same request at a later date in the apparent hope that procuring a fresh denial will renew their ability to take a timely appeal (which is a condition precedent to subject-matter jurisdiction in an Article 78 proceeding, as is *denial* of the appeal[48]). Such hopes, however, are misplaced, as the right to maintain a judicial proceeding begins to accrue upon the denial of the *initial* request—otherwise parties could extend the statute of limitations indefinitely by renewing requests for materials which have already been denied, in order to procure denial again[49] along with another chance to appeal.

---

40. *See, e.g., Van Steenburg*, 242 A.D.2d at 803, 661 N.Y.S.2d at 318.

41. *See infra* note 45.

42. *See* N.Y. PUB. OFF. LAW § 89(4)(b); *see also infra* note 46 and accompanying text.

43. *See* N.Y. PUB. OFF. LAW § 89 (4)(a).

44. *See id.*

45. *See* Swinton v. Records Access Officer, 198 A.D.2d 165, 604 N.Y.S.2d 59 (1st Dep't 1993); Laureano v. Grimes, 179 A.D.2d 602, 579 N.Y.S.2d 357 (1st Dep't 1992).

46. *See Van Steenburg*, 242 A.D.2d at 802-03, 661 N.Y.S.2d at 317-18.

47. *See* N.Y. C.P.L.R. 217(1) (McKinney 1990).

48. *See supra* note 38 and accompanying text.

49. *See, e.g., Van Steenburg*, 242 A.D.2d at 803, 661 N.Y.S.2d at 318; Pelt v. Police Dep't of City of New York, 258 A.D.2d 382, 685 N.Y.S.2d 687 (1st Dep't 1999); Mendez v. New York City Police Dep't, 260 A.D.2d 262, 688 N.Y.S.2d 538 (1st Dep't 1999); Corbin v. Ward, 160 A.D.2d 596, 554 N.Y.S.2d 240 (1st Dep't 1990); Karaffa v. Simon, 14 A.D.2d 978, 979, 222 N.Y.S.2d 47, 48 (3d Dep't 1961). Surprisingly, however, the Committee on Open Government has, in at least one of its opinions, stated

Before proceeding further, two comments are in order regarding the provision of FOIL that requires the agency to "fully explain" a denial upon administrative appeal.[50] First, the language of that provision is merely directory.[51] Therefore, if the agency fails to "fully explain" a denial of records, it does not forfeit anything.[52] In part, this stems from the very nature of an Article 78 proceeding brought pursuant to FOIL which is, by necessity, in the nature of mandamus to compel.[53] In a

---

that a request for records which had been denied on the basis that was later rejected in *Gould*, made by the same requestor *after Gould* was decided, should be accepted by the agency *because of Gould*. *See* Committee on Open Government, Advisory Op. No. 10857 (June 15, 1998), issued to Nemesio Turull. *But see* Pelt v. Police Dep't of City of New York, 258 A.D.2d 382, 685 N.Y.S.2d 687 (a change in *decisional* law cannot revive a claim and, therefore, a FOIL request which is procedurally barred); *cf* Buffalo News, Inc. v. Buffalo Enterprise Dev. Corp., 84 N.Y.2d 488, 493, 644 N.E.2d 277, 280 (1994) ("the advisory opinions of the Committee on Open Government are 'neither binding upon the agency nor entitled to greater deference in an Article 78 proceeding than is the construction of the agency' (John P. v. Whalen, 54 N.Y.2d 89, 96)."). As to Mr. Turull's Article 78 challenge to the NYPD's statute-of-limitations-based denial of his FOIL request, New York Supreme Court was apparently unimpressed with his argument that *Gould* required reconsideration of his request and dismissed his petition. *See* Turull v. Lombardi, 1998 N.Y. App. Div. LEXIS 9447 (1st Dep't 1998) (decision without published opinion).

50. *See* N.Y. PUB. OFF. LAW § 89(4)(a); *see also supra* note 43 and accompanying text.

51. *See* N.Y. STATUTES § 171 (a provision is only mandatory if it is *essential*; i.e., if it goes to the jurisdiction of the actor, and compliance is a condition precedent to the *validity* of the act undertaken pursuant to the statute. In contrast, directory provisions are mere instructions or directions, inserted for convenience, and an inexact compliance with such provisions, or even their disregard, constitutes only an irregularity, not a fatal defect). *See e.g., Van Steenburg*, 242 A.D.2d at 803, 661 N.Y.S.2d at 318; DeCorse v. City of Buffalo, 239 A.D.2d 949, 950, 659 N.Y.S.2d 604, 605 (4th Dep't 1997); Floyd v. McGuire, 87 A.D.2d 388, 452 N.Y.S.2d 416 (1st Dep't 1982).

52. *See, e.g., Floyd*, 87 A.D.2d at 390-91, 452 N.Y.S.2d 417-18 (rejecting the notion of such forfeiture as "too rigid," and "draconian," as well as violative of the legislative policy represented by FOIL's exemptions which, the court noted, *must* be considered. The court then specified that FOIL's requirement that the agency respond to an appeal within the allotted time frame was "directory rather than mandatory," and that the consequences of the agency's failure to do so was only that a requestor would be deemed to have exhausted FOIL's administrative remedies, upon which he would be entitled to seek judicial review).

53. *See* Vincent C. Alexander, *Practice Commentaries*, N.Y. C.P.L.R. 7801, C7801:1-4, 7803, C7803:1-5 (McKinney 1994). *See also, e.g., Buffalo News*, 84 N.Y.2d at 491, 644 N.E.2d at 278 (1994) ("[Petitioner] commenced this N.Y. C.P.L.R. Article 78 proceeding to compel disclosure of the documents"); Russo v. Nassau County Coll., 81 N.Y.2d 690, 696, 623 N.E.2d 15, 17 (1993) (citations omitted) ("Petitioner commenced this N.Y. C.P.L.R. Article 78 proceeding seeking to compel respondents to grant him

proceeding in the nature of mandamus to compel, "the [challenged] aggrievement does not arise from the final determination, but from the refusal of the body or officer to act or perform a duty enjoined by law" (such as the duty to provide access to records under FOIL).[54] Thus, it is not necessary—from a litigation standpoint—for an agency to have established a reason for its denial, at the administrative level, in order to defend against an Article 78 challenge which seeks to compel disclosure. While the appropriate standard of review in a proceeding in the nature of mandamus to *review* a prior administrative determination is whether that determination was arbitrary, capricious, or an abuse of discretion [55]—thus requiring that a reason for the agency's actions be established in order to be tested against that standard—a proceeding to *compel* disclosure, where the respondent's defense is that the record is exempt under New York Public Officers Law section 87(2), turns on whether that respondent can prove entitlement to *any* of FOIL's exemptions to disclosure.[56] A FOIL respondent is thus not barred from raising grounds for non-disclosure of records notwithstanding that those grounds were not raised before at the administrative appeal level,[57] and judicial review

---

access to" certain records under FOIL); Scott v. Records Access Officer of Syracuse, 65 N.Y.2d 294, 296, 480 N.E.2d 1071, 1072 (1985) ("[P]etitioner brought an Article 78 proceeding in the nature of mandamus to compel access to the reports pursuant to the Freedom of Information Law"); Farbman & Sons, Inc v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 79, 464 N.E.2d 437, 438 (1984) ("[Petitioner] then commenced this Article 78 proceeding to compel production [of records] in accordance with its request").

54. De Milio v Borghard, 55 N.Y.2d 216, 220, 433 N.E.2d 506, 507 (1982) (quoting Austin v. Board of Higher Educ., 5 N.Y.2d 430, 432, 158 N.E.2d 681, 687 (1959)).

55. *See* C.P.L.R. 7803(3); Pell v. Board of Educ., 34 N.Y.2d 222, 231, 313 N.E.2 321, 325 (1974).

56. *See* Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 496 N.E.2d 665, 667 (1986); *see also* Laureano v. Grimes, 179 A.D.2d 602, 603, 579 N.Y.S.2d 357, 358 (1st Dep't 1992).

57. *See* Scherbyn v. Wayne-Finger Lakes BOCES, 162 A.D.2d 967, 967-68, 557 N.Y.S.2d 192, 193 (4th Dep't 1990), *rev'd on other grounds*, 77 N.Y.2d 753, 757-58, 573 N.E.2d 562, 565 (1991) (the rule that judicial review of an agency determination is limited to the grounds invoked by the agency at the administrative level adheres only in Article 78 proceedings involving writs of mandamus or certiorari to review those determinations, and not writs of mandamus to compel). *See also Gould*, 89 N.Y.2d 267, 279, 675 N.E.2d 808, 814 (1996) (the Court, having found that the documents at issue were not exempt under the intra-agency materials exemption invoked by the Police Department, remitted the matter for determination as to "whether the Police Department can make a . . . showing that any [other] claimed exemption applies"); *Scott*, 65 N.Y.2d at 296, 480 N.E.2d at 1072. (In *Scott*, the respondent, having failed to raise sustainable grounds—in fact, *any* grounds—for denial of disclosure at the administrative level, raised

of the agency's denial is, therefore, de novo. Thus, omission of an explanation as to denial by the Appeals Officer, full or otherwise, can never be prejudicial to the agency's subsequent defense in litigation.[58]

---

a number of FOIL's exemptions to disclosure, for the first time, as defenses in the ensuing Article 78 proceeding. All of the exemptions raised by respondent, though rejected, were considered on the merits by Special Term. The Appellate Division modified Special Term's decision, ordering further exemption of portions of the records at issue, whereupon the Court of Appeals affirmed the Appellate Division's order.)

Note that, even where it *does* apply—such as in a proceeding seeking a writ of certiorari or mandamus to review an administrative determination—the rule that limits judicial review of a determination to the grounds invoked at the administrative level should not be misconstrued as *foreclosing* the agency from raising additional grounds *at all.* Instead, application of the rule may require remand in order to allow the agency to create a record, based upon its consideration of the additional ground, for the court to review. *See, e.g.*, Trump-Equitable Fifth Ave. Co. v. Gliedman, 57 N.Y.2d 588, 593, 443 N.E.2d 940, 942 (1982); Montauk Improvement Inc. v. Proccacino, 41 N.Y.2d 913, 363 N.E.2d 344 (1977); Barry v. O'Connell, 303 N.Y. 46, 100 N.E.2d 127 (1951) (cases applying the rule, and then remanding to the respondent-agency to properly consider the additional ground at the administrative level). *See also* Sec. & Exch. Comm. v. Chenery Corp., 332 U.S. 194, 199 (1947) (apparently the seminal case from which the rule sprang and which, after remand to the agency, explicitly rejected the position that the rule granted a petitioner any vested right to benefit from an agency's initial failure to raise a sustainable ground for its determination); *accord Gould,* 89 N.Y.2d at 279, 675 N.E.2d at 814; Billups v. Santucci, 151 A.D.2d 663, 664, 542 N.Y.S.2d 726, 727 (2d Dep't 1989) (although the Article 78 respondent failed to produce any evidence that the requested documents fell within any FOIL exemption, the matter was remitted to determine which documents were properly subject to disclosure); Moore v. Santucci, 151 A.D.2d 677, 677-78, 543 N.Y.S.2d 103, 105 (2d Dep't 1989) (although the Article 78 respondent's stated reasons for denial were not cognizable under FOIL, the matter was remitted for a de novo determination of petitioner's entitlement to the records at issue, in accordance with the established rules governing FOIL disclosure).

58. *See* Sec. & Exch. Comm. v. Chenery Corp., 332 U.S. 194, 199-201; *accord Gould,* 89 N.Y.2d at 279, 675 N.E.2d at 814. Moreover, FOIL exemptions, by their terms, are often temporary (for example, the Interference Exemption itself may cease to apply where any potential investigations and judicial proceedings have run their course). It is axiomatic, therefore, that exemptions not initially raised because they did not yet apply, or because their applicability had not yet been discovered, may apply later, especially where the records at issue arise from a dynamic process such as an investigation. As agency business does not come to a halt simply because someone has made a FOIL request, it would be an absurd result indeed if agencies were precluded from asserting subsequent applicable exemptions simply because they did not emerge until after the agency's denial on an earlier ground which had ceased to apply by the time litigation had rolled around. *See* Floyd v. McGuire, 87 A.D.2d 388, 452 N.Y.S.2d 416 (1st Dep't 1982); DeCorse v. City of Buffalo, 239 A.D.2d 949, 659 N.Y.S.2d 604 (4th Dep't 1997); Van Steenburg v. Thomas, 242 A.D.2d 802, 661 N.Y.S.2d 317 (3d Dep't 1997).

Second, the phrase "fully explain" is nowhere defined in FOIL. However, contrary to the suggestions of some litigants, it certainly requires something much less than a *particularized showing*,[59] which is an evidentiary creature and which, according to the Court of Appeals, has no place outside of the litigation context.[60] It thus cannot arise at the administrative appeal level. Moreover, the particularized showing requirement applies only to denials which are based upon one of FOIL's enumerated exemptions.[61] Thus, if denial is possible based upon reasons other than a claim of exemption, then to "fully explain" should simply require that the agency identify *that* reason. And denial is indeed possible for a variety of reasons other than exemption. For instance, New York Public Officers Law section 89(3) provides for three grounds for denial outside of section 87(2): 1) that the requested record was not reasonably described; 2) that the agency does not possess the requested record; or 3) that the requested record cannot be located after a diligent search; section 89(5) provides for the exception from disclosure of information submitted to a state agency[62] by any person acting pursuant to law or regulation;[63] and section 89(7) provides for non-disclosure of the home address of an officer, employee, former officer or employee of a public employees' retirement system, as well as of several other categories of persons.[64] Moreover, if the reason *is* that the record is subject to one of the enumerated section 87(2) exemptions, it should not

59. *See infra* Part IV.C.2.

60. *See* Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 496 N.E.2d 665, 667.

61. *See* N.Y. PUB. OFF. LAW § 87(2); *Gould*, 89 N.Y.2d at 275, 675 N.E.2d at 811 (requiring the agency to articulate the necessary showing in order "to invoke *one of the exemptions of* [N.Y. PUB. OFF. LAW] *section 87(2).*") (emphasis added). See also N.Y. PUB. OFF. LAW § 89(4)(b), which only places the evidentiary burden of proof on an agency, in an Article 78 proceeding, when the agency invokes one of the exemptions found at § 87(2).

62. See N.Y. PUB. OFF. LAW § 89(5)(h) for the definition of a state agency under FOIL.

63. Note that, pursuant to the procedure set forth in this section, the burden of proof under N.Y. PUB. OFF. LAW § 89(4)(b) still applies if the information falls within the provisions of §§ 87(2)(d) and 89(5)(f); otherwise, the agency decision to except information from disclosure under this section is unreviewable. *See* N.Y. PUB. OFF. LAW §§ 89(4) (a) & (b).

64. Still additional grounds may be that the request is barred by the doctrine of res judicata or is duplicative of an earlier request which was denied, *see, e.g.*, Pelt v. Police Dep't of City of New York, 258 A.D.2d 382, 685 N.Y.S.2d 687 (1st Dep't 1999), or is moot, *see, e.g.*, Moore v. Santucci, 151 A.D.2d 677, 543 N.Y.S.2d 103 (2d Dep't 1989), among others.

even be necessary to identify the particular exemption (in some cases, declining to include such specificity may simply be a necessity so as not to reveal, or even hint at, confidential information contained in records[65]). Therefore, where denial is based on a claim of exemption, simply stating that records "are exempt pursuant to N.Y. Public Officers Law section 87(2)," or something of that nature, should be sufficient to "fully explain" the reasons for denial within the meaning of New York Public Officers Law section 89 (4)(a).[66]

While on the subject as to what an agency is and is not required to articulate under FOIL, some clarification is in order, as well, regarding FOIL's "certification" requirement. As set forth above, an agency is required to provide written certification where it does not possess a requested record, or where, pursuant to a diligent search, a record cannot be located.[67] FOIL does not prescribe the specific form of the certification, leaving such to the discretion of the agency providing it. Moreover, the requirement, like the requirement to "fully explain" the reasons for denial on appeal, is strictly directory.[68] It appears, in fact, that the requirement serves no other purpose than to apprize the requestor that denial of a record is based upon nothing more than the agency's inability to locate it (perhaps to save the requestor from needlessly pursuing the requested item in an Article 78 proceeding). Thus, satisfaction of the requirement should be deemed complete, simply upon the agency's official written response to the requestor representing that it either does not possess the record, or cannot locate it. It need not be in affidavit form, nor must it provide any details of the search conducted (if one was required), or state a legal position, or use the word "diligent." Neither must the representation regurgitate the wording of the statute, nor contain any other talismanic language, as long as the message is clear. This was, in fact, the view of the Court of Appeals in *Gould*, when it upheld the

65. *See, e.g.*, Nalo v. Sullivan, 125 A.D.2d 311, 312, 509 N.Y.S.2d 53, 54 (2d Dep't 1986) (petitioner in an Article 78 proceeding need not be informed of the underlying facts concerning withheld records, even in litigation, where disclosure of such information could effectively subvert the purpose of the exemption).

66. Moreover, where an agency proffers this construction of the term "fully explain," unless it were found to be "irrational or unreasonable, [it] should be upheld." Ostrer v. Schenck, 41 N.Y.2d 782, 766, 364 N.E.2d 1107, 1109 (1977) (*citing* Howard v. Wyman, 28 N.Y.2d 434, 438, 271 N.E.2d 528, 529 (1971)).

67. *See* N.Y. Pub. Off. Law § 89(3); *see also supra* notes 34 & 35 and accompanying text.

68. *See supra* notes 51 & 52.

dismissal of petitioner Harold Scott's[69] claim that the Police Department's response to his FOIL request had been insufficient to certify its inability to locate some of the records he sought.[70] This becomes truly apparent, if not solely based on the Court's language, then upon a reading of the Police Department's brief—in which its response to Scott's FOIL request was described—to which the Court's language was responding:

> The Police Department's Records Access Officer stated, in response to Scott's FOIL request, "A search of our records indicates that we have accessed all documents located relative to your request" [ ]. . . . A responding agency should not have to list each item requested and make a particularized statement relating to each, if the response to each is the same, which is that it is unavailable. It is not necessary, moreover, that talismanic language be iterated to demonstrate the non-availability of requested materials, if a plain statement is made that the agency has no responsive documents.[71]

Thus, Scott's argument that "[b]ecause the NYPD did not certify the negative results of a complete records search, or state a legal position regarding allegedly exempt documents, its response did not constitute a proper certification by the FOIL Records Access Officer of a diligent records search with negative results..."[72] was wholly rejected by the Court.[73] All that is therefore required for an agency to certify that it does not possess a requested record, or, after it has conducted the requisite diligent search, that it cannot locate a record, is notice from the agency constituting its official response to the requestor and containing a plain statement that it has no documents responsive to the request (or to a particular portion of the request, as the case may be). In fact, the practice

---

69. Harold Scott was one of the three petitioners whose Article 78 proceedings were consolidated and decided sub nom Gould v. New York City Police Dep't *Gould*, therefore, consists of three cases: Gould v. New York City Police Dep't, 89 N.Y.2d 267, 675 N.E.2d 808 (1996); Scott v. New York City Police Dep't, 89 N.Y.2d 267, 675 N.E.2d 808 (1996); DeFelice v. New York City Police Dep't, 89 N.Y.2d 267, 675 N.E.2d 808 (1996). *See Gould,* 89 N.Y.2d at 272-73, 675 N.E.2d at 810. Note that the petitioner in *Scott* was the same individual who had brought Scott v. Chief Med. Exam'r, 179 A.D.2d 443, 577 N.Y.S.2d 861 (1st Dep't 1992).

70. *See id.* at 279, 675 N.E.2d at 814.

71. *See id.* (Respondent's Brief at 35-36).

72. *See id.* (Appellant Scott's Brief at 21).

73. *See Gould,* 89 N.Y.2d at 279, 675 N.E.2d at 814.

of the NYPD at the time of Scott's request—which was to simply reference the documents that *were* found pursuant to the search, and specify that those documents constitute all records responsive to the request which could be located by the agency—is sufficient to meet this requirement.[74]

Scott's failure to comprehend that this result was inevitable points up a basic flaw in the approach of many FOIL petitioners, which is to assume that FOIL is somehow above and beyond the reach of the basic principles of administrative law, against which the behavior of government agencies is measured. For instance, under the well-settled "presumption of regularity"[75] that attaches to governmental actions, an agency's representation that it could not locate documents will carry the *presumption* that the required *diligent search* had been conducted prior to making the representation, even where the agency does not specifically

74. *See id.* Moreover, in order to refute the agency's representation, a petitioner must, by more than mere speculation or conjecture, "articulate a demonstrable factual basis to support [the] contention that the requested documents exist and [are] in the [agency's] control." *Id. See also* Almonor v. Rosenberg, 237 A.D.2d 168, 655 N.Y.S.2d 361 (1st Dep't 1997); Pennington v. McMahon, 234 A.D.2d 624, 650 N.Y.S.2d 492 (3d Dep't 1996); DiRose v. New York State Dep't of Correctional Servs., 216 A.D.2d 691, 627 N.Y.S.2d 850 (3d Dep't 1995); Wood v. Ellison, 196 A.D.2d 933, 602 N.Y.S.2d 237 (3d Dep't 1993); Mitchell v. Slade, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep't 1991); Corbin v. Ward, 160 A.D.2d 596, 554 N.Y.S.2d 240 (1st Dep't 1990). But what exactly satisfies the evidentiary burden of articulating a "demonstrable factual basis?" The burden is a formidable one. Petitioners have proffered everything from newspaper articles, which appear to refer to the existence of sought-after records, to the agency's own documents, which appear to do the same (which is what Scott did). However, even Scott's claim, that the records he sought *must* exist because of the references made to them in other police department documents, was deemed "conjecture" by the Court of Appeals. *See* Appellant Scott's Brief at 20; *Gould,* 89 N.Y.2d at 279, 675 N.E.2d at 814.

75. "There is a presumption of regularity with respect to government agencies in that it is presumed they 'act honestly and in accordance with law and do nothing contrary to official duty nor omit anything which official duty requires to be done.' (Fisch, New York Evidence § 1134.)." Abrahams v. New York State Tax Comm'r., 131 Misc.2d 594, 500 N.Y.S.2d 965 (Sup. Ct. 1986); *see also* Gae Farms, Inc. v. Diamond, 40 A.D.2d 909, 909, 337 N.Y.S.2d 865, 867 (3d Dep't 1972) (*citing* Taub v. Pirnie, 144 N.E.2d 3, 5-6, 3 N.Y.2d 188, 195 (1957)) (agencies are not required "to affirmatively prove compliance with required procedures...Administrative actions are presumed to have been regular absent the rebuttal of the presumption of regularity."); *see also* Thomas v. Town of Bedford, 29 Misc.2d 861, 214 N.Y.S.2d 145 (Sup. Ct. 1961) (*citing* RICHARDSON, EVIDENCE § 71 (8th ed. 1948) for the presumption of regularity attending official acts); *see also* FARRELL, PRINCE, RICHARDSON ON EVIDENCE, § 3-120 (11th ed. 1997) ("This presumption compels the adversary to come forward with affirmative evidence of unlawful or irregular conduct. 'Substantial evidence' is required to overcome the presumption of regularity.").

say so to the requestor.[76] There is simply nothing in FOIL's language to suggest the suspension of this well-settled principle. Of course, a failure to *conduct* a search where required[77] would indeed constitute a failure to comply with a material requirement of the statute. However, it is simply not necessary for an agency to recite every step it takes in the course of compliance with one statute or another—at least not prior to litigation, and even then, not unless a petitioner advances a demonstrable factual basis upon which to question the agency's compliance with that statute.[78]

---

76. Other petitioners have attempted to make an argument similar to Scott's—that the agency's clear and unambiguous representation is insufficient to meet FOIL's certification requirement. A Second Department case that petitioners sometimes raise in support of this argument is *Key v. Hynes*, 205 A.D.2d 779, 613 N.Y.S.2d 926 (2d Dep't 1994), where the court required the agency to proffer an affidavit as to the diligence with which the search for records had been conducted. However the court in *Key* ordered the affidavit only after it found that the respondent's conflicting representations had raised an issue of fact as to the claim that the records could not be found, noting that "[u]nder *the unusual circumstance of this case*, we cannot agree with [the respondent's] argument" that the record at issue could not be located. *Id.* (emphasis added). Thus, *Key* is not inconsistent with *Gould* as to this result. To the extent it is, it should be deemed overruled (by *Gould*), as should be *Thomas v. Records Access Officer*, 205 A.D.2d 786, 613 N.Y.S.2d 929 (2d Dep't 1994) (where the court had required an affidavit from someone with personal knowledge as to the search, though no "demonstrative factual basis" by which to challenge the agency's representation had first been advanced). A recent post-*Gould* decision by the First Department, however, relying on *Key*, held that neither the letter of the Records Access Officer, nor the affirmation of the Police Department attorney who had reviewed the agency file, were sufficient to meet FOIL's certification requirement. *See* Rattley v. New York City Police Department, 270 A.D.2d 170, 706 N.Y.S.2d 26 (1st Dep't 2000), *leave to appeal granted*, 716 N.Y.S.2d 283 (1st Dep't 2000). This is especially surprising since, in *Gould*, the Court of Appeals was upholding the First Department's determination that the Police Department's certification practice under FOIL had been proper. *Gould*, 89 N.Y.2d at 279, 675 N.E.2d at 814. Nevertheless, pursuant to *Gould*, the Court of Appeals has already considered and squarely decided this very issue. *See, e.g.*, People v. Bourne, 139 A.D.2d 210, 216, 531 N.Y.S.2d 899, 902-903 (1st Dep't 1988) (*citing* Empire Sq. Realty Co. v. Chase Nat'l Bank, 181 Misc. 752, 43 N.Y.S.2d 470, *aff'd* 267 A.D. 817, 47 N.Y.S.2d 105, *leave denied* 267 A.D. 901, 48 N.Y.S.2d 325 ("A case . . . is precedent as to those questions presented, considered and squarely decided.")).

77. Note that a search is not always necessary. For example, it is not required where the request fails to reasonably describe the record requested. *See* Konigsberg v. Coughlin, 68 N.Y.2d 245, 501 N.E.2d 1 (1986); *see also* Mitchell v. Slade, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep't 1991) (FOIL places the threshold requirement upon a requestor to reasonably describe a record so that the agency can search for it).

78. *See, e.g.*, *Gould*, 89 N.Y.2d at 279, 675 N.E.2d at 814 (1996); *accord* Calvin K. v. DeFrancesco, 200 A.D.2d 619, 608 N.Y.S.2d 850 (2d Dep't 1994); Mitchell v. Slade, 173 A.D.2d 226, 569 N.Y.S.2d 437 (1st Dep't 1991); Ahlers v. Dillon, 143 A.D.2d 225, 226, 532 N.Y.S.2d 22, 23 (2d Dep't 1988).

Finally, where denial of a FOIL request is based upon one of the ten exemptions enumerated in section 87(2) of the N.Y. Public Officers Law, then section 89(4)(b) of the statute places upon the agency the burden, during litigation, of proving that the record falls within the scope of an exemption.[79] Although a proceeding in the nature of mandamus to compel normally requires that the petitioner bear the burden of establishing a clear legal right to the relief sought,[80] that burden is automatically met based upon FOIL's legislatively declared presumptive availability of public access.[81] Section 89(4)(b) appears simply to recognize that fact, and thus shifts the burden to the agency at the outset of litigation. Therefore, as to an exemption-based denial,[82] a petitioner in a FOIL Article 78 proceeding need merely demonstrate that she has met all of FOIL's threshold mechanical requirements (i.e., that the agency denied a written request reasonably describing a record, and further denied such request upon timely administrative appeal) in order to state a claim.[83] No "argument" by the petitioner is actually necessary unless and until the agency is able to meet its section 89(4)(b) burden in its answering papers because, until then, the petitioner's right of access is

79. That the agency's burden of proof is limited both to the litigation context and to the invocation of one of the exemptions specified in N.Y. PUB. OFF. LAW § 87(2) is made clear by the language of N.Y. PUB. OFF. LAW § 89(4)(b) itself, which states, in pertinent part: "[a] person denied access to a record ... may bring a proceeding for review of such denial pursuant to article seventy-eight of the civil practice law and rules. In the event that access to any record is denied *pursuant to the provisions of subdivision two of section eighty-seven* of this article, the agency involved shall have the burden of proving that such record falls within the provisions of such subdivision two." (emphasis added). *See also Capital Newspapers*, 67 N.Y.2d 562, n.566, 496 N.E.2d 665, n.667 (1986) (citations omitted) (where the Court of Appeals specified that both FOIL and its interpretive case law "speak only of the agency's burden of proof *when its denial of disclosure to a FOIL applicant is challenged in an article 78 proceeding*") (emphasis added); *see also Gould*, 89 N.Y.2d at 275, 675 N.E.2d at 811 (citations omitted) ("[*T*]*o invoke one of the exemptions of section 87(2)*, the agency must articulate 'particularized and specific justification' for not disclosing requested documents") (emphasis added).

80. *See, e.g.*, Association Ct. Reporters v. Bartlett, 40 N.Y.2d 571, 357 N.E.2d 353 (1976) (citations omitted) (success in a proceeding in the nature of mandamus to compel requires a showing of a "'clear legal right' to the relief sought ... [which] must be so clear as not to admit of reasonable doubt or controversy.").

81. *See* N.Y. PUB. OFF. LAW § 84 (McKinney 1988).

82. *See* N.Y. PUB. OFF. LAW § 87(2) (McKinney 1988).

83. This is why there is no harm where the requestor is not apprised, prior to litigation, of the particular exemption relied upon by the agency. *See, e.g.*, *supra* notes 51-54 and accompanying text.

presumed[84] and her reasons for seeking the record are irrelevant.[85] If and when the respondent's burden is met, however, the petitioner will not prevail unless she can somehow refute the agency's response. Where denial is based on other than a section 87(2) exemption, then the section 89(4)(b) burden upon the agency does not apply, and the FOIL petitioner should (generally) bear the initial burden of proof to the same extent that any other Article 78 petitioner would.[86]

III. BACKGROUND

In 1992, *Scott v. Chief Medical Examiner*,[87] the Appellate Division, First Department, unanimously affirmed Supreme Court's dismissal of petitioner Harold Scott's Article 78 challenge to the NYPD's denial of his FOIL request for various agency records. In its decision, the court concluded that the records at issue, "including DD5s are interagency material, which are not final agency policy or determinations, and are exempted from disclosure under FOIL by N.Y. Public Officers Law section 87(2)(g)(iii) . . . ."[88] The decision also found that police officers'

84. *See, e.g.*, Scott v. Records Access Officer, 65 N.Y.2d 294, 296, 480 N.E.2d 1071, 1073 (1985) (*citing* Farbman & Sons v. New York City Health & Hosps. Corp., 62 N.Y.2d 75, 79-80, 464 N.E.2d 437, 439 (1984)).

85. This is generally so. *See id.*; *cf.* John P. v. Whalen, 54 N.Y.2d 89, 99, 429 N.E.2d 117, 122 (1981). However, as to N.Y. PUB. OFF. LAW § 87(2)(b) (FOIL's "Personal Privacy Exemption"), for example, a requestor's reasons for seeking a record can indeed be relevant to the propriety of the exemption. Thus, in *Scott* the release, to a personal injury law firm, of the names and addresses on motor vehicle accident reports, where the firm had stated its intent to use such list for direct mail solicitation of accident victims, was deemed an unwarranted invasion of personal privacy under N.Y. PUB. OFF. LAW § 87(2)(b) (which exempts from disclosure, inter alia, lists of names to be used for commercial purposes). *See Scott*, 65 N.Y.2d at 299, 480 N.E.2d at 1074.

86. *See supra* note 77; *see also* FARRELL, PRINCE, RICHARDSON ON EVIDENCE § 3-210 (11th ed. 1995).

87. 179 A.D.2d 443, 577 N.Y.S.2d 861 (1st Dep't 1992).

88. *Id.* at 444, 577 N.Y.S.2d at 862; N.Y. PUB. OFF. LAW § 87(2)(g)(iii), protects from disclosure materials which are "inter-agency or intra-agency materials which are not . . . [inter alia] final agency policy or determinations . . . ." *Id.* Note that "DD5" is the bygone NYPD designation—though it is still used, informally, by NYPD personnel—of the form known as a Complaint Follow-Up Report ("DD" stood for Detective Division; "5" was simply a sequential reference number). It is the primary document upon which detectives record the progress of police investigations—such as the gathering of information and evidence, the identity and statements of witnesses, and the results of surveillance operations and canvasses. As such, it is often a rich source of information as to a given police investigation, and generally a document of great interest to criminal defense counsel, for obvious reasons.

memo books[89] were the private property of the officers, thus placing them outside of the ambit of FOIL, which only applies to agency records. Pursuant to *Scott*, the NYPD's DD5s, as well as police officers' memo books, were thus granted "blanket protection" from access under FOIL.[90]

Scott remained the law of the land until 1996, when the New York Court of Appeals rendered its decision in *Gould*.[91] As in *Scott*, the *Gould* petitioners requested from the NYPD, and were denied access to, DD5s and memo book entries. The agency's denial, which directly referenced the *Scott* decision, was upheld in Supreme Court, and by the First Department on appeal. The Court of Appeals, however, reversed the Appellate Division and held that DD5s were not categorically exempt from disclosure pursuant to N.Y. Public Officers Law section 87(2)(g)(iii) (hereinafter, the "Intra-Agency Materials Exemption"[92]), and that memo books were indeed agency—not private—property, and were thus within the ambit of FOIL.[93] As the Court observed, "blanket exemptions . . . for particular types of documents are inimical to FOIL's policy of open government."[94]

In addition to its holding, the Court, in dicta,[95] also dispelled the notion that Criminal Procedure Law Article 240[96] is a statute that explicitly exempts records from disclosure within the meaning of FOIL's Statutory Exemption.[97] In this regard, the Court cited *Farbman v. NYC*

89. A memo book consists of a bound pad, and is generally used to record a police officer's day-to-day on-duty activity.

90. The court also found that memo books would nevertheless qualify for exemption from disclosure under N.Y. PUB. OFF. LAW § 87(2)(b), as well as § 87(2)(g). *See Scott*, 179 A.D.2d at 444, 577 N.Y.S.2d at 862.

91. *See supra* note 69 and accompanying text.

92. *See supra* note 88.

93. *See Gould*, 89 N.Y.2d at 278, 675 N.E.2d at 813.

94. *Id.* at 275, 675 N.E.2d at 811.

95. *See id.* at 274, 675 N.E.2d at 811.

96. *See supra* note 11.

97. *See Gould*, 89 N.Y.2d at 274, 675 N.E.2d at 811. The Court stated, "insofar as the Criminal Procedure Law does not *specifically* preclude defendants from seeking . . . documents under FOIL, we cannot read such a categorical limitation into the statute," *id.* (emphasis added), and cited N.Y. PUB. OFF. LAW § 87(2)(a), which only exempts from disclosure records that "are *specifically* exempted from disclosure by state or federal statute" (emphasis added). Thus, here the Court said only that, absent language in the Criminal Procedure Law which *specifically* provides for exemption of a record, then the Criminal Procedure Law did not fall within *this* particular exemption. *See Gould*, 89 N.Y.2d at 274, 675 N.E.2d at 811.

Health & Hospitals Corp.,[98] which had similarly held that CPLR Article 31 (the civil discovery statute)[99] did not fall within FOIL's Statutory Exemption either. Although *Gould's* actual holding[100] and its dicta were limited in scope, and the records at issue pertained to post-conviction petitioners, *Gould* has sometimes been construed as opening the door to using FOIL as a wholesale criminal discovery tool,[101] the reach of which vitiates the Criminal Procedure Law.[102]

For instance, shortly after the *Gould* decision, an article in the *New York Criminal Law News* declared that "[t]he immediate result of this decision is a new discovery tool for defendants in criminal proceedings."[103] Subsequently, one FOIL petitioner in an Article 78 proceeding proffered the proposition that *Gould* "*clearly entitles* criminal defendants to use FOIL"[104] in an attempt to construe the Court's dicta as a de facto defeat of the respondent's defense under the Interference Exemption[105]—an entirely separate exemption based upon an entirely different premise than that implicated in the dicta. Additionally, a recent FOIL decision stated that "[t]he Court of Appeals has recently advanced [in *Gould*] the proposition that inmates have rights under FOIL even more expansive than the rights conferred to them by the Criminal

98. Farbman & Sons v. New York City Health and Hosps. Corp., 62 N.Y.2d 75, 81, 464 N.E.2d 437, 439 (1984). In *Farbman*, the Court held that absent an express provision or unequivocal legislative intent so indicating, "CPLR Article 31 is not a statute 'specifically exempting' public records from disclosure under FOIL." *Id.* (citations omitted).

99. N.Y. C.P.L.R. 3101, et seq.

100. The Court also decided a secondary issue: it rejected the claim of petitioner Harold Scott, who had challenged the police department's certification that it could not locate the records he had requested. *See supra* text accompanying notes 67-78 (Scott's claim and FOIL's certification requirement).

101. Judge Bellacossa, in a prescient dissent, predicted that criminal defendants would attempt to use FOIL in this manner. *See Gould*, 89 N.Y.2d at 279-80, 675 N.E.2d at 814-15 (Bellacossa, J., dissenting).

102. *See supra* Part I.

103. *See* Joseph DeFelice, *A New Discovery Tool—The Freedom of Information Act*, 18 N.Y. CRIM. L. NEWS 1 (1996). Note that the author, attorney Joseph DeFelice, was one of the *Gould* petitioners (though acting on behalf of a client). *See Gould*, 89 N.Y.2d at 273, 675 N.E.2d at 810. That article's position on the impact of the decision is, thus, not altogether surprising.

104. *See* Legal Aid Soc'y v. New York City Police Dep't, N.Y. L.J., Oct. 22, 1998, at 29 (Sup. Ct. 1998) (Petitioner's Affirmation, dated Aug. 6, 1997 titled a "Cross-motion for Class Certification") (emphasis added).

105. N.Y. PUB. OFF. LAW § 87(2)(e)(i) (McKinney 1999).

Procedure Law" (however, based upon the remainder of the court's analysis, it does not appear that this interpretation materially affected the outcome of that case).[106]

Although such misconstruals (however irksome they may be to the government attorney) are generally manageable, at times they can be dangerous,[107] as demonstrated in another decision rendered pursuant to a proceeding brought by counsel for a criminal defendant awaiting trial. There, the court entirely rejected the respondent's Interference Exemption defense, simply stating that "[t]he Court in *Gould* stated that factual information . . . is 'available pursuant to the provisions of FOIL'" and thus, incredibly, ordered the disclosure of the names and addresses of witnesses in a drug-related contract-murder case.[108] Additionally, in what is the most troubling misinterpretation of *Gould* to date, in 1998, a decision was rendered which announced that "it is proper, as per *Gould*, for criminal defendants to use F.O.I.L. requests as a means of [criminal] disclosure" and went on to use that conclusion as a springboard for declaring that responses to such FOIL requests must therefore be made in sufficient time "so that such disclosure can be used in preparation for trial."[109] This astonishing decision also specified that non-disclosure—or even redaction—of a requested document required, prior to any litigation

106. Hillard v. Clark, 174 Misc.2d 282, 664 N.Y.S.2d 424 (Sup. Ct. 1997), *aff'd* 254 A.D.2d 756, 677 N.Y.S.2d 857 (1998), *leave denied*, 92 N.Y.2d 818, 708 N.E.2d 177 (1997).

107. The Court in *Gould* acknowledged the potential dangers—including those to the safety of witnesses—of the inappropriate disclosure of police files, leaving it to the balance struck by FOIL's exemptions to ensure a check on the inherent risks carried by such disclosure. *See Gould*, 89 N.Y.2d at 278, 675 N.E.2d at 813.

108. *See* Codelia v. Police Dep't, No. 104987/97, Decision (Sup. Ct. N.Y. County June 11, 1997); Codelia v. Police Dep't, No. 104987/97, Decision on Reargument (Sup. Ct. N.Y. County October 21, 1997). This decision was subsequently—and extensively—modified, upon reargument. Note that, the judge in the criminal case had already ruled, prior to the FOIL proceeding, that such records were not available pursuant to criminal discovery.

109. Legal Aid Soc'y v. New York City Police Dep't, N.Y. L.J., Oct. 22, 1998, at 29 (Sup. Ct. 1998), *but see* Pittari v. Pirro, 179 Misc.2d 241, 683 N.Y.S.2d 700 (Sup. Ct. 1998), *aff'd* 258 A.D.2d 202, 696 N.Y.S.2d 167 (2d Dep't 1999) (records relating to a pending prosecution are exempt from disclosure under FOIL, as their release constitutes an interference with a judicial proceeding); *accord* Legal Aid Soc'y v. New York City Police Dep't, 713 N.Y.S.2d 3 (1st Dep't 2000), *appeal denied*, 2000 N.Y. LEXIS 3925 (N.Y. Dec. 21, 2000). *See also* Lecker v. New York City Bd. of Educ., 157 A.D.2d 486, 549 N.Y.S.2d 673 (1st Dep't 1990), *appeal dismissed*, 75 N.Y.2d 946, 554 N.E.2d 1280 (1990) (the time within which a determination as to a FOIL request will be rendered is left to the agency, and may not be proscribed).

having been commenced, "a detailed fact-specific reason for that non-disclosure."[110]

Of course many, if not most of these misinterpretations are doubtless based upon an honest lack of understanding of FOIL and a less-than-careful reading of *Gould*. Contrary to such misinterpretations, however, the Court of Appeals, in *Gould*, specifically stated: "The holding herein is *only* that these [complaint follow-up, or DD5] reports are not *categorically* exempt *as intra-agency material.*"[111] Thus, the Court was extremely clear that *Gould's* holding was strictly limited to the narrow issue concerning the application of the Intra-Agency Materials Exemption to DD5's. Moreover, the Court also left no doubt as to the limited scope of its Criminal Procedure Law Article 240 discussion—which was, in any event, no more than dicta[112]—as demonstrated by the remainder of its holding, which specified that the records at issue could in fact be withheld under, inter alia, the Law Enforcement Exemption: "Indeed, the Police Department is *entitled* to withhold complaint follow-up reports, or specific portions thereof, under *any other* applicable exemption, *such as the law-enforcement exemption . . .*"[113] Significantly, the Court then remitted the matter to Supreme Court, to determine "whether the Police Department can make a particularized showing that *any* [*other*] *claimed exemption applies;*"[114] something which it would not

110. *Id. But see* Capital Newspapers v. Burns, 67 N.Y.2d 562, 566, 496 N.E.2d 665, 667, 505 N.Y.S.2d 576 (1986) (an agency's burden of proof under FOIL only arises during litigation).

111. *Gould,* 89 N.Y.2d at 277, 675 N.E.2d at 812 (emphasis added).

112. "A case . . . is precedent only as to those questions presented, considered and squarely decided." People v. Bourne, 139 A.D.2d 210, 216, 531 N.Y.S.2d 899, 902-03 (1st Dep't 1988) (*citing* Empire Sq. Realty v. Chase Nat'l Bank, 181 Misc. 752, 755 43 N.Y.S.2d 470 (N.Y. Sup. Ct. 1943), *aff'd* 267 A.D. 817, 47 N.Y.S.2d 105, (1st Dep't 1944), *leave denied* 267 A.D. 901, 48 N.Y.S.2d 325 (1st Dep't 1944)). But neither FOIL's Statutory Exemption nor, therefore, Criminal Procedure Law Article 240 had been raised or argued in *Gould* because the records sought by the *Gould* petitioners all related to *completed* criminal prosecutions that had resulted in convictions. The Court's discussion here was, therefore, merely dicta, though Court of Appeals dicta carries considerable weight in providing guidance to lower courts. *See id.* (*citing* Gimbel Bros. v. White, 256 A.D. 439, 10 N.Y.S.2d 666 (3d Dep't 1939)). The guidance provided by *this* dicta, however, has indeed been heeded: after *Gould*, few agencies, if any, would attempt to argue that pre-prosecution records of this type are exempt based on Article 240 under the *Statutory Exemption.* That, however, is the extent of the Court's guidance on this issue, and none of FOIL's other exemptions fall within its scope. *See supra* note 111 and accompanying text.

113. *Gould,* 89 N.Y.2d at 277, 675 N.E.2d at 813 (emphasis added).

114. *Id.*

have done unless the records at issue were indeed possibly subject to other exemptions,[115] such as the Law Enforcement Exemption as suggested in the holding.[116] Thus, despite its frequent portrayal as having opened a "back door" to criminal discovery in New York,[117] *Gould* has actually left FOIL's most potent defense against such an incursion intact, in the form of the Interference Exemption.[118]

IV. ANALYSIS

A. *The Independent Nature of FOIL's Exemptions*

One reason that the *Gould* decision seems to have lent itself to such misinterpretation may have less to do with the decision itself, and more to do with the nature of the exemptions enumerated under FOIL. Therefore, before delving into our analysis of FOIL's Interference Exemption and the evidentiary burden required to sustain it, a simple clarification as to the nature of FOIL's exemptions should prove useful. Simply put, FOIL's exemptions are independent—that is, any record may be subject to more than one exemption, and a court's finding that a given exemption does not apply to a given record has no bearing upon the potential applicability of any other exemptions to that record.[119] *Gould's* holding and remittal made this quite clear.[120] However, based upon FOIL's burden of proof,[121] even if an exemption is perfectly appropriate to a particular record, if that exemption is not raised—and therefore not considered by the court—disclosure of the record may

115. *Accord* Short v. Board of Managers, 57 N.Y.2d 399, 404, 442 N.E.2d 1235, 1237 (1982) (FOIL's "exceptions to disclosure . . . are independent").

116. As the Appellate Division, First Department, recently observed, "[w]hile holding that these [DD5] reports were not categorically exempt as intra-agency materials, the Court of Appeals in *Gould* clearly expressed reservations about their being released too freely.." Johnson v. New York Police Dep't, 257 A.D.2d 343, 694 N.Y.S.2d 14 (1st Dep't 1999) (citations omitted).

117. *See, e.g.*, DeFelice, *supra* note 103.

118. The applicability of the Interference Exemption under FOIL is addressed in detail *infra* Part IV.C.

119. *See Short*, 57 N.Y.2d at 404, 442 N.E.2d at 1237 (1982) (FOIL's "exceptions to disclosure . . . are independent").

120. *See Gould*, 89 N.Y.2d at 277, 675 N.E.2d at 812.

121. *See* N.Y. PUB. OFF. LAW § 89(4)(b).

nevertheless result (unless the court finds it appropriate to remit the matter for further proceedings, as the Court of Appeals did in *Gould*).[122]

Thus, in cases where the agency, for one reason or another, fails to argue the "correct" exemption, judicial decisions can result which may be misread as holding that a particular type of record is per se non-exempt under FOIL, even though that non-availability is actually limited to the facts of that case and the exemption argued.[123] An illustration of this dynamic can be seen in the interplay between *Scott v. Chief Medical Examiner*[124] and *Laureano v Grimes*.[125] Approximately two weeks after the First Department, in *Scott*, held that police officers' memo books were the personal property of the officers, and were exempt under FOIL's Personal Privacy[126] and Intra-Agency Materials exemptions, a different panel of the First Department, in *Laureano* (also a FOIL proceeding), ordered memo books disclosed. While this "apparent" inconsistency may lead some to conclude that *Laureano* had overturned *Scott* and found memo books to be per se accessible under FOIL, a proper reading of the two decisions reveals that the *Laureano* court had only construed the Law Enforcement Exemption's confidentiality provision[127] since, apparently, no other exemption had been raised in the proceeding (note that the *Scott* decision had not yet been rendered when *Laureano* was briefed and argued). Thus, the blanket protection afforded by *Scott* was simply not affected by *Laureano*, as the First Department itself confirmed in *Johnson v. New York City Police Department*,[128] a case decided subsequent to *Laureano*. There, the court stated, "[w]e affirm our holding in *Matter of Scott v. Chief Med. Examiner of the City*

122. As previously set forth, there is actually no requirement to specify applicable exemptions prior to litigation. *See supra* notes 51-54 and accompanying text. The discussion here is only as to the failure to raise the appropriate—or the "correct"—exemption *during* litigation, where the court did *not* remit the matter to the agency to raise an additional exemption.

123. *See, e.g.*, Legal Aid Soc'y v. New York City Police Dep't, N.Y. L.J., Oct. 22, 1998, at 29 (Sup. Ct. 1998) (where the court declared that *Gould* allows criminal defendants to use FOIL for discovery purposes); *see also supra* note 109 and accompanying text.

124. 179 A.D.2d 443, 577 N.Y.S.2d 861 (1st Dep't 1992).

125. 179 A.D.2d 602, 579 N.Y.S.2d 357 (1st Dep't 1992).

126. *See* N.Y. PUB. OFF. LAW § 87(2)(b).

127. *See* N.Y. PUB. OFF. LAW § 87(2)(e)(iii).

128. 220 A.D.2d 320, 632 N.Y.S.2d 568 (1st Dep't 1995).

of N.Y. [citations omitted] that DD5 reports and police officers' memo books are exempt from FOIL disclosure."[129]

It is thus easy to see how a failure to fully comprehend the independent nature of FOIL's exemptions, coupled with a less than careful reading of *Gould*, can lead to erroneous conclusions. However, just as "blanket exemptions . . . are inimical to" the policies underlying FOIL, so too is "blanket access." Thus, *Gould's* discussion as to the inapplicability of FOIL's Statutory Exemption to Criminal Procedure Law Article 240, simply cannot be read as having any effect on the applicability of the Interference Exemption to a proceeding governed by that article's discovery provisions.

B. *FOIL's Federal Analogue: The Freedom of Information Act*

1. FOIA's Applicability to FOIL: The Parallel Statutes Doctrine

Not only is federal case law construing FOIA relevant to any analysis of FOIL, but, in fact, no comprehensive analysis of FOIL can effectively be undertaken without it, as FOIA and FOIL are parallel statutes. The parallel relationship between FOIA and FOIL is undisputed. In his *Fordham Law Review* article entitled *The New York Freedom of Information Law*,[130] New York State Senator Ralph Marino, one of FOIL's sponsors, noted at the outset that FOIL was "[p]atterned after the Federal Freedom of Information Act."[131] Additionally, in 1977, the New York State Legislature amended FOIL[132] so as to more closely "conform New York State's version . . . to the Federal Law"[133] which had itself been amended only three years before.[134] Therefore, the importance of the relationship between FOIL and FOIA cannot be overstated, since that relationship places FOIA's legislative history and interpretive precedents central to the effective interpretation of the parallel provisions of FOIL.

The "doctrine" of construing a state statute by looking to the construction of a parallel enactment is not new, and has had a long legal

---

129. *Id.* This language also dispels any notion that *Scott* had been limited to the particular set of DD5s before the court at the time.

130. 43 FORDHAM L. REV. 83 (1974).

131. *Id.* at 83.

132. *See* L. 1977, ch. 933 (effective January 1, 1978).

133. New York Legis. Ann., 1977, 330, 331.

134. *See infra* Part IV.B.2.a.

tradition in New York as a basic canon of construction.[135] In fact, uniformity of construction between similar federal and state statutes has long been held to be highly desirable and entitles relevant federal decisions to great weight in determining an open question.[136] Indeed, where the New York State Legislature models a statute after a federal analogue, there is a specific presumption that the Legislature deliberately and intentionally adopted the fundamental concepts underlying the federal version.[137]

Thus, "[w]here state statutes are identical or nearly identical in language and purpose with federal statutes, New York courts generally accord great weight to federal decisions construing such federal statutes. . . . It has even been held that where the New York Court of Appeals in construing a state statute followed federal decisions interpreting a similar federal statute, a lower court was therefore *bound* to follow the applicable federal cases in the field."[138] Therefore, "[s]tate legislation which is modeled after a Federal statute will be construed in accordance with Federal decisions."[139]

The applicability of this doctrine to FOIA and FOIL is nowhere clearer than in *Fink v. Lefkowitz*,[140] wherein the Court of Appeals, in construing one of the four provisions of FOIL's Law Enforcement Exemption, specified that:

> [t]he legislative history of the Freedom of Information Law indicates that many of its provisions, including the exemption at issue here, were patterned after the Federal analogue. Accordingly, *Federal case law and legislative history on the scope of this exemption are instructive.*[141]

---

135. *See, e.g.*, N.Y. STAT. § 262(b) (McKinney 1999) (statutes adopted from other jurisdictions).

136. *See* Mosbacher v. Graves, 254 A.D. 438, 5 N.Y.S.2d 553 (3d Dep't 1938).

137. *See* Marx v. Bragalini, 6 N.Y.2d 322, 328, 160 N.E.2d 611, 613 (1959).

138. 28 N.Y. JUR. 2d, § 231, 287, 288 (emphasis added).

139. Coane v. American Distilling Co., 182 Misc. 926, 932, 49 N.Y.S.2d 838, 844 (Sup. Ct. 1944) (citations omitted).

140. 47 N.Y.2d 567, 393 N.E.2d 463 (1979).

141. *Id.* at 572, 393 N.E.2d at 466 (citations omitted); *see also* Westchester News v. Kimball, 50 N.Y.2d 575, 408 N.E.2d 904 (1980); Washington Post Co. v. New York State Ins. Dep't, 61 N.Y.2d 557, 567, 463 N.E.2d 604, 607 (1984); Hanig v. New York Dep't of Motor Vehicles, 79 N.Y.2d 106, 112, 588 N.E.2d 750, 754 (1992); Hawkins v. Kurlander, 98 A.D.2d 14, 16-17, 469 N.Y.S.2d 820, 822 (4th Dep't 1983); McAuley v. Board of Educ., 61 A.D.2d 1048, 1048-49, 403 N.Y.S.2d 116, 117 (2d Dep't 1978).

Thus, in *Hawkins v. Kurlander*[142] the Appellate Division, also recognizing that the Law Enforcement Exemption (in particular, the very provision of the Law Enforcement Exemption we are concerned with here—the Interference Exemption[143]) is one which was specifically patterned after a parallel FOIA provision, adopted the construction of federal case law regarding the FOIA version of the exemption.[144]

Moreover, not only is FOIL's legislative history clear that FOIL was patterned after FOIA,[145] but FOIA's own voluminous legislative history[146] provides a fount of guidance as to legislative intent. This is especially true of FOIA's Interference Exemption, the 1974 amendment of which was in response to specific, and well-documented, Congressional concerns.[147] Moreover, it is significant that FOIL itself was amended to substantially its present form in 1977, in order to more closely "conform [it]... to the Federal Law,"[148] *subsequent to* FOIA's 1974 amendment. Of even greater significance, FOIL's Interference Exemption, one of the provisions revised upon FOIL's 1977 amendment, followed the format of FOIA's Interference Exemption amendment in virtual lockstep, with extraordinary similarity.[149] The connection between the two statutes—and especially of their respective Interference Exemptions—is therefore inescapable. Thus, any analysis of FOIL's Interference Exemption must, for guidance, look to its FOIA

142. 98 A.D.2d 14, 469 N.Y.S.2d 820 (4th Dep't 1983).

143. The applicability of the Interference Exemption under FOIL is addressed in detail *infra* Part IV.C.

144. *See Hawkins*, 98 A.D.2d at 16-17, 469 N.Y.S.2d at 822.

145. *See supra* notes 131-33 and accompanying text.

146. FOIA's legislative history is addressed in detail *infra* Part IV.B.2.b.ii.

147. *See id.*

148. *See supra* note 133 and accompanying text.

149. Prior to its 1977 amendment, FOIL had provided, in pertinent part, that "[n]otwithstanding the provisions of subdivision one of this section [providing for access to agency records], this article shall not apply to information that is ... d. part of investigatory files compiled for law enforcement purposes." N.Y. PUB. OFF. LAW § 88, subd. 7, ¶ d; *see* L. 1974, ch 578; L 1974, ch 579. Upon its amendment, the relevant provision required that "[e]ach agency shall ... make available for public inspection and copying all records, except ... records or portions thereof that ... (e) are compiled for law enforcement purposes and which, if disclosed, would [inter alia] interfere with law enforcement investigations or judicial proceedings." N.Y. PUB. OFF. LAW § 87(2)(e)(i). Compare FOIA's amendment of "Exemption 7," discussed *infra* Part IV.B.2.a. Note the extraordinary similarity between the *pre-amendment versions* of these provisions, as well.

counterpart,[150] the legislative intent, and the construction of which must be deemed to have been adopted by the New York Legislature.[151]

2. Interference with a Proceeding

a. The 1974 Amendment to FOIA

Originally, FOIA's Exemption 7 had protected from disclosure "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."[152] The exemption's purpose in precluding the use of FOIA as a discovery tool had historically been recognized by the courts.[153] The exemption's amendment in 1974[154] was in specific response to four decisions of the District of Columbia Circuit, rendered in 1973 and 1974.[155] These four decisions barred access to investigatory files, not simply where an enforcement proceeding was imminent or in contemplation, but even where no such proceeding was contemplated, or where the proceeding had been completed, and regardless of the actual nature of the material contained in such a file.[156] This "blanket protection" from disclosure which was thus afforded by the construction rendered by these decisions[157] had, in the eyes of Congress, completely exceeded the exemption's original purpose,[158] and "shield[ed] from disclosure information that Congress had not intended to

150. *See* Fink v. Lefkowitz, 47 N.Y.2d at 572, 393 N.E.2d at 466.

151. *Cf. id.*; *see also* Marx v. Bragalini, 6 N.Y.2d 322, 328, 160 N.E.2d 611, 613; Mosbacher v. Graves, 254 A.D. 438, 5 N.Y.S.2d 553 (3d Dep't 1938).

152. Pub. L. No. 89-487, 80 Stat. 250 (1966).

153. *See, e.g.*, Wellman Industries Inc. v. NLRB, 490 F.2d 427 (4th Cir. 1974); Wellford v. Hardin, 444 F.2d 21, 23 (4th Cir. 1971); Williams v. IRS, 345 F.Supp. 591, 594 (D. Del. 1972); Clement Bros., Inc. v. NLRB, 282 F.Supp. 540, 542 (N.D. Ga. 1968); *see also* NLRB v. Robbins Tire, 437 U.S. 214, 226 (1978) (citations omitted) ("[T]he 1966 Act was expressly intended to protect against the mandatory disclosure through FOIA of witnesses' statements prior to an unfair labor practice proceeding. From one of the first reported decisions under FOIA, through the time of the 1974 amendments, the courts uniformly recognized this purpose.").

154. Pub. L. No. 93-502, 88 Stat. 1561 (1974).

155. *See* Weisberg v. United States Dep't of Justice, 489 F.2d 1195 (1973), *cert. denied*, 416 U.S. 993 (1974); Aspin v. Department of Defense, 491 F.2d 24, 30 (1973); Ditlow v. Brinegar, 494 F.2d 1073 (1974); Center for Nat'l. Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370 (1974).

156. *See Robbins Tire*, 437 U.S. at 228-29.

157. *Id.* at 236.

158. *See id.* at 227.

protect."[159] In the words of Senator Philip A. Hart, the amendment's proponent, these decisions thereby "erected a 'stone wall' against public access to *any* material in an investigatory file."[160] Thus, pursuant to the 1974 amendment, the application of Exemption 7 became limited to:

> investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel . . . .[161]

b. Construction of the 1974 Amendment's Interference Exemption

i. Foundation: *Title Guarantee Co. v. NLRB*[162]

In 1976, the Second Circuit Court of Appeals rendered a decision in the case of *Title Guarantee Co. v. NLRB*[163] directly construing FOIA's Interference Exemption (known in the case law as "Exemption 7(A)")[164] in light of the legislative history surrounding the 1974 amendment. In *Title Guarantee*, the National Labor Relations Board (the "NLRB" or the "Board") was before the court on its appeal from a district court order which had required disclosure of investigative statements obtained by the Board from employees of the Title Guarantee Company pursuant to an unfair labor practice charge. That order had stemmed from the

159. *Id.*

160. *Id.* at 229 (emphasis added). Note also that the word "file" was changed to "record," specifically to prevent the blanket protection afforded by commingling material in an investigatory file which did not have to be kept confidential. *Id.* at 229-30.

161. Pub. L. No. 93-502, 88 Stat. 1561 (1974).

162. 534 F.2d 484 (2d Cir. 1976), *cert. denied*, 429 U.S. 834 (1976).

163. *Id.*

164. *See* 5 U.S.C. § 552(b)(7)(A) (1994).

company's FOIA request to the NLRB seeking disclosure of the statements prior to the Board's hearing on the charge. When the Board denied the request (claiming exemption under FOIA), both initially and on administrative appeal,[165] Title Guarantee filed suit in the U.S. District Court for the Southern District of New York.[166] The district court rejected the Board's Exemption 7(A) argument that disclosure prior to the hearing would interfere with the proceeding.[167] The court concluded that release of the records "would not block further information of the same type from similar sources nor would it stifle effective preparation of the case" and that "it does not appear that the specific enforcement proceeding would be harmed."[168] The order of disclosure was followed by the Board's appeal to the Second Circuit Court of Appeals.

The Second Circuit began its analysis with a review of the NLRB's rules for the conduct of its proceedings, focusing on its rules governing discovery, "[s]ince the substantive effect of acceptance of [Title Guarantee's] disclosure contentions would be tantamount to the issuance of new, broader discovery rules for NLRB proceedings."[169] The court noted that the NLRB's rules permitted only limited discovery in its proceedings, which did not extend to pre-hearing disclosure of the statements sought by Title Guarantee. In other words the NLRB's discovery scheme had apparently been designed to preclude access to witness statements *prior* to a hearing.

In considering the alteration of the NLRB's discovery scheme, which would result from allowing pre-hearing access to the materials sought, and upon examination of FOIA's case law and the legislative history of its 1974 amendment, the court concluded: "We cannot envisage that Congress intended to overrule the line of cases dealing with ... discovery in pending enforcement proceedings by virtue of a back-door amendment to the FOIA when it could very easily have done so by direct amendment...."[170] In this regard, the court found it "*significant* that it is never suggested in the legislative history of the 1974 amendment to the FOIA that any ... modification of agency discovery rules was intended,"[171] and noted that "[t]he cases that Exemption 7(A) was

165. *See* Title Guarantee Co. v. NLRB, 407 F.Supp. 498 (S.D.N.Y. 1975).

166. *See id.*

167 *See id.* at 503-04.

168. *Id.* at 505.

169. *Title Guarantee*, 534 F.2d at 487.

170. *Id.* at 491.

171. *Id.* at 492 (emphasis added).

intended to overrule were for the most part *closed* investigatory file cases."[172]

The Circuit court concluded, contrary to the district court's finding,[173] that "interference with the proceedings could well result"[174] from the pre-hearing disclosure of materials not otherwise available under the Board's discovery scheme, based upon at least two avenues that the Board suggested: "first, suspected violators might use disclosure to learn the Board's case in advance and frustrate the proceedings or construct defenses which would permit violations to go unremedied; [and] second, employees who are interviewed may be reluctant . . . to have it known that they have given information . . . ."[175] In direct support of the first of these two propositions, the court quoted from the 1974 amendment's legislative history,[176] which stated in pertinent part: "One example of interference when litigation is pending or in prospect is harm to the Government's case through the premature release of information not possessed by known or potential adverse parties [citations omitted]." Thus, the court held that the statements sought by Title Guarantee, prior to the Board's hearing, were indeed exempt from disclosure under Exemption 7(A).[177]

ii. The Standard: *NLRB v. Robbins Tire*[178]

A number of circuits followed the Second Circuit's lead in the *Title Guarantee* decision,[179] thus establishing "the weight of Circuit authority" as to the construction of Exemption 7(A).[180] However, in 1977, the United States Court of Appeals for the Fifth Circuit, in deciding another labor relations case, *Robbins Tire and Rubber Co. v. NLRB*,[181] rejected

---

172. *Id.*

173. *See supra* note 168 and accompanying text.

174. *Title Guarantee*, 534 F.2d at 491.

175. *Id.*

176. *Id.* at 492 (quoting from the Attorney General's Memorandum on the 1974 Amendments, as documented in the FREEDOM OF INFORMATION ACT AND AMENDMENTS OF 1974 (P.L. 93-502) SOURCEBOOK: LEGISLATIVE HISTORY, TEXTS AND OTHER DOCUMENTS 508, 517-17 (1975)).

177. *See Title Guarantee*, 534 F.2d at 492.

178. 437 U.S. 214 (1978).

179. *See id.* at 219 n.5 (enumerating the decisions that followed *Title Guarantee*).

180. *Id.*

181. 563 F.2d 724 (5th Cir. 1977).

the Second Circuit's view of "'earlier or greater access' as a kind of interference protected against by exemption 7(A)."[182] Despite the fact that the Fifth Circuit indeed found that "[i]n the present situation, there may be some risk of interference with Board proceedings in the form of witness intimidation from harassment of an employee-witness . . . in an effort to silence him or dilute the nature of his testimony,"[183] it nevertheless held that the Board had failed to sustain "its burden of proving that the possibility of intimidation *in this case* through disclosure . . . brings Exemption 7(A) into play."[184] This holding essentially affirmed that of the U.S. District Court for the Northern District of Alabama, which had held that without a "claim that release of the documents . . . would pose [a] *unique or unusual danger* of interference with the particular enforcement proceeding, Exemption 7(A) did not apply."[185] After finding, additionally, that the Board had failed to sustain its burden as to the other exemptions raised, the Circuit court affirmed the district court's order compelling disclosure.[186] Upon the Board's petition, the Supreme Court granted certiorari "to resolve the conflict among the Circuits."[187]

The question presented to the Supreme Court was whether FOIA required the NLRB to disclose, prior to a hearing on an unfair labor practice complaint, statements of witnesses whom the Board intended to call at the hearing. Resolution of the question turned, according to the Court, on "whether production of the material prior to the hearing would interfere with enforcement proceedings within the meaning of Exemption 7(A) of FOIA."[188] At the outset, the Court soundly rejected the position of the appellee, Robbins Tire & Rubber Company (and of both the District Court and the Fifth Circuit Court of Appeals), that determinations of interference under Exemption 7(A) must be made on a case-by-case basis.[189] The Court found that the language of the exemption, as a whole, in fact suggested the contrary.[190] As the Court noted:

182. *Id.* at 730.
183. *Id.* at 732.
184. *Id.* at 733 (emphasis added).
185. *Robbins Tire*, 437 U.S. at 217 (emphasis added).
186. *See id.* at 219.
187. *Id.* at 220.
188. *Id.* at 216.
189. *See id.* at 223.
190. *See id.* at 223-24.

> There is a readily apparent difference between subdivision (A) and subdivisions (B), (C), and (D). The latter subdivisions refer to particular cases— "a person," "an unwarranted invasion," "a confidential source"— and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, *since subdivision (A) speaks in the plural voice about 'enforcement proceedings,' it appears to contemplate that certain generic determinations might be made.*[191]

The Court then proceeded to undertake a detailed review of FOIA's legislative history, specifically focusing on Exemption 7's 1974 amendment.[192] Key to an understanding of Exemption 7(A), the Court pointed out (as had the *Title Guarantee* court[193]) that one of the original, pre-amendment purposes of Exemption 7[194] "was to prevent 'harm [to] the Government's case in court' by not allowing litigants 'earlier or greater access' to agency investigatory files than they would otherwise have."[195] The Court went on to note, with regard to the passage of the amendment, that "[i]ndeed, in an unusual, post-passage reconsideration vote, the Senate modified the language of this Exemption specifically to meet Senator Humphrey's concern that it might be construed to require disclosure of 'statements of agency witnesses' prior to the time they were called on to testify in agency proceedings."[196] In this regard, the Court noted, Senator Humphrey had been concerned that, in NLRB proceedings in particular, "'[w]itnesses would be loath to give statements if they knew that their statements were going to be made known to the parties before the hearing'."[197] Senator Humphrey subsequently agreed that the version of the exemption ultimately passed in 1966 would "take care of the situation" he had voiced such concerns about.[198] The Court further observed that courts uniformly recognized the purpose of the

191. *Id.* (emphasis added). Note that FOIL's parallel provision is likewise stated in the plural. *See* N.Y. PUB. OFF. LAW § 87(2)(e)(i).

192. *See Robbins Tire*, 437 U.S. at 224.

193. *See* 534 F.2d at 490.

194. Prior to the inclusion of Exemption 7's interference provision. *See supra* Part IV.B.2.a.

195. *Robbins Tire*, 437 U.S. at 225 (citations omitted).

196. *Id.*

197. *Id.*

198. *See id.* at 226.

exemption, to preclude premature disclosure of witness statements, through the time of the 1974 amendment.[199]

Turning its attention to the amendment itself, the Court noted that, pursuant to his initial proposal of the amendment on the Senate floor, Senator Hart had specifically referred to the original intent of the 1966 Congress "'to prevent harm to the Government's case by not allowing an opposing litigant earlier or greater access to investigatory files than he would otherwise have' . . . [and] *indicated his continued agreement with this purpose.*"[200] The Court observed that "Senator Hart believed that his amendment would [both] rectify [the] erroneous judicial interpretations [which had prompted the amendment] *and clarify Congress' original intent,*"[201] and that "[t]he thrust of congressional concern in its amendment of Exemption 7 was [simply] to make clear that the Exemption did not endlessly protect material simply because it was in an investigatory file."[202] Further emphasizing that the 1974 amendment was not meant to alter the original pre-amendment intent of the exemption, the Court explained:

> That the 1974 Congress did not mean to undercut the intent of the 1966 Congress with respect to Senator Humphrey's concern about interference with pending NLRB enforcement proceedings is apparent from the emphasis that both Senators Kennedy and Hart, the leaders in the debate on Exemption 7, placed on the fact that the amendment represented no radical departure from prior case law.[203]

It is thus clear that the purpose of the amendment was not to effectuate any change as to the exemption's scope or to overturn the case law construing what constitutes an interference, which had always encompassed "earlier or greater access" to agency files than otherwise available under the operative discovery scheme in a potential proceeding.

In construing the evidentiary burden required to sustain the exemption, the Court also considered then-President Ford's veto message in response to the 1974 amendment, as well as the debate which led to Congress's override of the veto. The Court found it significant that

199. *See id.*

200. *Id.* (emphasis added).

201. *Id.* at 229 (emphasis added).

202. *Id.* at 230.

203. *Id.* at 232.

President Ford's expressed view that the amended version of the exemption "would require the Government to 'prove . . . —separately for each paragraph of each document—that disclosure 'would' cause' a specific harm," was emphatically rejected by the leading supporters of the amendment who, referring to that construction as "*ludicrous*," stated that "the burden is *substantially less* than we would be led to believe by the President's message."[204] Upon completion of its foray into Exemption 7's legislative history, the Court concluded that:

> [W]hile the [Fifth Circuit] Court of Appeals was correct that the amendment of Exemption 7 was designed to eliminate "blanket exemptions" for Government records simply because they were found in investigatory files compiled for law enforcement purposes, we think it erred in concluding that no *generic* determinations of likely interference can ever be made. We conclude that Congress did not intend to prevent the federal courts from determining that, with respect to particular *kinds* of enforcement proceedings, disclosure of particular *kinds* of investigatory records while a case is pending would *generally* "interfere with enforcement proceedings."[205]

Upon arriving at this foundational conclusion[206] the Court then held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure at least until completion of the Board's hearing."[207] The Court reasoned that "[h]istorically, the NLRB has provided little pre-hearing discovery in unfair labor practice proceedings and has relied principally on statements such as those sought here to prove its case. . . . *A profound alteration in the Board's trial strategy . . . would thus be effectuated*" if a case-by-case showing of interference were required as to each individual proceeding, such as had been held by the Fifth Circuit.[208] In this regard the Court, consistent with basic tenets of statutory interpretation, also noted that:

> In the absence of clear congressional direction to the contrary, we should be hesitant under ordinary circumstances to interpret

204. *Id.* at 235 (emphasis added).

205. *Id.* at 236 (emphasis added).

206. Based upon this conclusion, the "generic category" approach and the policy (held by both Congress and the New York Court of Appeals) against "blanket exemptions" are, clearly, perfectly consistent.

207. *Robbins Tire*, 437 U.S. at 236.

208. *Id.* at 237 (emphasis added).

> an ambiguous statute to create such dislocations. Not only is such direction lacking, but Congress in 1966 was particularly concerned that premature production of witnesses' statements in NLRB proceedings would adversely affect that agency's ability to prosecute violations of the [National Labor Relations Act], and, as indicated above, the legislative history of the 1974 amendments affords no basis for concluding that Congress at that time intended to create any radical departure from prior, court-approved, Board practice. Our reluctance to override a long tradition of agency discovery, based on nothing more than an amendment to a statute designed to deal with a wholly different problem, is strengthened by our conclusion that the dangers posed by premature release of the statements sought here would involve precisely the kind of "interference with enforcement proceedings" that Exemption 7(A) was designed to avoid.[209]

The Court then considered the specific types—that is, the generic categories—of interference which could result from pre-hearing disclosure. The Court found "the most obvious risk of 'interference' with enforcement proceedings in this context" to be coercion or intimidation of those who have given statements "in an effort to make them change their testimony or not testify at all."[210] Although the Court found this risk to be especially acute as applied to an employee-employer context, the Court also recognized that "both employees *and non-employees* [in other words, *any* witnesses] may be reluctant to give statements ... at all, absent assurance that unless called to testify in a hearing, their statements will be exempt from disclosure" until after the adjudication.[211] Finally, addressing what is perhaps its most comprehensive category of interference posed by pre-hearing disclosure, the Court reiterated that which had *always* been among Congress's primary concerns in enacting and amending the exemption:

> disclosure ... would constitute an 'interference' with ... enforcement proceedings [if] a party litigant [receives] earlier and greater access to the [government's] case than he would

209. *Id.* at 238-39; *accord* N.Y. STAT. § 153 (McKinney 1971) (a change in long established rule of law is not deemed to have been intended by the Legislature in the absence of a clear manifestation of such intention).

210. *Robbins Tire*, 437 U.S. at 239.

211. *Id.* at 240 (emphasis added).

> otherwise have .... Even without intimidation or harassment a suspected violator with advance access to the Board's case could 'construct defenses which would permit violations to go unremedied'.[212]

The Court found that this possibility arose simply based upon the disclosure itself.[213] Also noting that it could not see how FOIA's purpose (which, like that of New York's FOIL, is to ensure an informed citizenry),[214] "would be defeated by deferring disclosure until after the Government has 'presented its case in court'" and that Congress "could not have intended [FOIA's amendment] to overturn the NLRB's long-standing rule against pre-hearing disclosure,"[215] the Court reversed the judgement of the Fifth Circuit, concluding:

> It was Congress' understanding, and it is our conclusion, that release of such statements *necessarily 'would interfere'* in the statutory sense with the Board's 'enforcement proceedings.' We therefore conclude that the [Fifth Circuit] Court of Appeals erred in holding that the Board was not entitled to withhold such statements under Exemption 7(A).[216]

In a concurring opinion which echoed the Court's recognition of "earlier and greater" access as a category of interference,[217] Justice Stevens, joined by Chief Justice Burger and Justice Rehnquist, added:

> The "act of meddling in" a process is one of Webster's accepted definitions of the word "interference". A statute that authorized discovery greater than that available under the rules normally applicable to an enforcement proceeding would "interfere" with the proceeding in that sense. The court quite correctly holds that the Freedom of Information Act does not authorize any such

212. *Id.* at 241 (citations omitted).

213. *See id.* at 242-43. *Compare* Fink v. Lefkowitz, 47 N.Y.2d 567, 572-73, 393 N.E.2d 463, 466-467 (1979) ("However beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records ... to construct a defense to impede a prosecution.... The Freedom of Information Law was not enacted to furnish the safecracker with the combination to the safe.").

214. *Robbins Tire*, 437 U.S. at 242; *see also* N.Y. PUB. OFF. LAW § 84.

215. *Robbins Tire*, 437 U.S. at 242.

216. *Id.* at 243 (emphasis added).

217. *Id.* at 241.

> interference in Labor Board enforcement proceedings. *Its rationale applies equally to any enforcement proceeding.*[218]

Thus, in construing the burden required to sustain a denial of disclosure pursuant to FOIA's Interference Exemption, the Supreme Court in *Robbins Tire* rejected the proposition that a case-by-case examination of records was required, and instead found that "generic determinations" (in the context of both records and harm) were implicitly authorized by the language of the exemption. Moreover, in reciting several categories of obvious risk of harm posed by pre-hearing disclosure of records not otherwise available pursuant to an agency's discovery scheme, the court's most encompassing finding in that regard was as to the risk posed by "earlier or greater access"[219] than that authorized by a discovery scheme.[220] This finding was well supported by legislative history, and was further emphasized in the concurring opinion. That concurrence also emphasized the likewise obvious application of the Court's rationale to *any* enforcement proceeding, in an observation which was not lost upon future courts.

iii. Clarification: *J.P. Stevens & Co. v. Perry*[221]

In a FOIA case commenced in 1976, but not decided until after the Supreme Court rendered its *Robbins Tire* decision, the federal Equal Employment Opportunity Commission[222] (the "EEOC" or the "Commission") had filed an employment discrimination charge against J.P. Stevens and Company, Incorporated ("Stevens"), prompting a FOIA request by Stevens to the EEOC for several categories of documents.[223] The EEOC granted access to some of the requested records, noted that certain other records did not exist, and denied access to still others (the denied documents were ultimately identified as affidavits and statements of witnesses made to the EEOC pursuant to its investigation, certain correspondence between the Commission and various parties, and certain

---

218. *Id.* at 243 (Stevens, J., concurring) (emphasis added); *accord* U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 776-77 (1989) (citing *Robbins Tire*'s concurring opinion, with approval).

219. *Robbins Tire*, 437 U.S. at 241.

220. *See id.*

221. 710 F.2d 136 (4th Cir. 1983).

222. Defendant Lowell Perry was then the Chairman of the Commission.

223. *See J.P. Stevens*, 710 F.2d at 137.

internal memoranda).[224] That denial was upheld on administrative appeal, upon which Stevens filed suit in the U.S. District Court for South Carolina. The EEOC defended against disclosure on the basis of FOIA Exemptions 3[225] and 7(A). However, after an in camera inspection of the documents, the district court held that Exemption 3 did not apply and that Exemption 7(A) only applied to the affidavits and statements of witnesses, and ordered disclosure of the remaining withheld documents.[226] EEOC appealed to the U.S. Court of Appeals for the Fourth Circuit.

In its argument on appeal, the EEOC claimed that Exemption 7(A) entitled the records at issue to a "blanket exemption" from disclosure, simply because they had been compiled for law enforcement purposes. The court summarily rejected this argument, noting Congress's rejection of the same proposition by its 1974 amendment of FOIA.[227] However, upon a review of the legislative history of the 1974 amendment and upon extensive reference to *Robbins Tire* itself, the court noted that "[w]hile a 'blanket exemption,' as urged by the Commission, is not mandated by *Robbins Tire*, neither is a case-by-case approach."[228] The district court, however, had indeed proceeded on a case-by-case basis, reviewing each document in camera even after the EEOC had made a showing of interference based on sixteen document categories.[229] The circuit court found that "[t]he examination of each document within the category by the district court was error,"[230] as was its order that some of the documents be disclosed,[231] and reversed the district court as to that portion of its decision addressing Exemption 7(A).[232]

The circuit court found that an examination of the "titles" of each of the sixteen document categories (e.g., "internal memos between various offices of the EEOC concerning the processing of the charges filed";

224. *See id.* at 138.

225. *See* 5 U.S.C. § 552(b)(3) (1994). Exemption 3 provides an exclusion from disclosure for records which are specifically exempted from disclosure by another statute, within certain parameters.

226. *See J.P. Stevens*, 710 F.2d at 138.

227. *See supra* Part IV.B.2.a.

228. *See J.P. Stevens*, 710 F.2d at 141.

229. *See id.* at 142.

230. *Id.*

231. *See id.* at 143.

232. However, the circuit court affirmed the district court's rejection of the EEOC's Exemption 3 argument. *See id.*

"[c]orrespondence between labor organizations and the Commission concerning the processing of charges"; and a number of other categories of internal memos and correspondence, as well as several categories pertaining to the aforementioned affidavits and witness statements) was a sufficient identification of the records at issue, pursuant to the *Robbins Tire* standard, to support its holding "that disclosure . . . would interfere with any enforcement proceeding that may stem from the investigation."[233] The court noted that "[t]hese categories [of records] represent the 'generic determinations' of *Robbins Tire*."[234] Additionally, the court enumerated four generic categories of *interference* that would result from premature disclosure of the materials within the enumerated *record* categories:

> Premature disclosure of these documents would (1) create a "chilling effect" on potential witnesses and dry up sources of information . . . ; (2) hamper the free flow of ideas between Commission employees and supervisors or with other governmental agencies; (3) hinder its ability to shape and control investigations; and (4) make more difficult the future investigation of charges and enforcement thereof.[235]

Finally, the court observed that: "It is obvious that plaintiff brought this action with the intention of using the freedom of information act as a discovery tool. *Robbins Tire* makes clear that such premature discovery was not intended and is the type of 'interference' prohibited by exemption 7(A)."[236]

The *J.P. Stevens* decision is particularly salient due to its clarification of *Robbins Tire's* application as well as its scope. Not only had the district court erred in reviewing each requested document individually, but its order had limited the applicability of Exemption 7(A) to witness statements and affidavits[237] in an apparent, albeit insufficient, attempt at conformity with *Robbins Tire*. In an effort to shed light on the district court's error, the circuit court stated "[a]n understanding of *Robbins Tire* is complicated by the language of the majority which seems to restrict itself to statements of witnesses."[238] The

233. *J.P. Stevens*, 710 F.2d at 143.

234. *Id.*

235. *Id.*

236. *Id.*

237. *See supra* note 226 and accompanying text.

238. *J.P. Stevens*, 710 F.2d at 141.

court, however, dispelled the notion of any such limitation by denying disclosure as to all sixteen of categories of records, thereby reaching well beyond witness statements and affidavits, based upon the aforementioned categories of interference. In addition, the court, here reviewing a matter beyond the context of a NLRB proceeding, further noted that "the scope of *Robbins Tire* is clarified by a short concurrence of three justices,"[239] and quoted the concurring opinion of Justices Stevens, Burger and Rehnquist[240] which specified that *Robbins Tire*'s rationale applied equally to "any enforcement proceeding."[241]

iv. The Landscape Since *Robbins Tire*

A number of decisions have applied the Supreme Court's *Robbins Tire* standard. Both the spectrum and scope of the *Robbins Tire* "categories" developed in some of these cases should certainly prove instructive.[242] A number of such cases involved records based on criminal proceedings. For instance, FOIA actions brought by the targets of several criminal tax investigations culminated in decisions that barred access to the records, under Exemption 7(A), pursuant to the *Robbins Tire* standard.

In *Grabinski v Internal Revenue Service,*[243] a FOIA case stemming from a pre-prosecution request for tax-related criminal investigatory records, the District Court for the Eastern District of Missouri denied disclosure pursuant to Exemption 7(A), finding that the documents, which were

> generally . . . categorized as 1) information received from third parties in the course of the IRS's investigation of plaintiff, 2) letters to and from such third parties, 3) memoranda compiled by the Special Agent of telephone conversations, and 4) the Special Agent's worksheets, notes, diary entries, etc., [had been] compiled by [the IRS] during the course of an investigation into

239. *Id.*

240. *See also supra* note 218 and accompanying text.

241. *J.P. Stevens,* 710 F.2d at 141. There is no indication, however, that there had ever been any question as to *Robbins Tire*'s scope, nor should there be; nothing in the statute or its legislative history ever suggested that Exemption 7(A) was somehow limited to NLRB cases.

242. *See* Fink v. Lefkowitz, 47 N.Y.2d 567, 572, 393 N.E.2d 463, 466 (1979).

243. 478 F. Supp. 486 (E.D. Mo. 1979).

> possible criminal . . . liability of plaintiff [and that the completed investigation had been] referred to the United States Attorneys. . . for possible criminal prosecution.[244]

Once again, "earlier or greater access" was cited as a category of interference recognized under *Robbins Tire*.[245] The court found that the documents involved fell within the exemption, holding that the "[p]laintiff may not utilize the FOIA to gain earlier or greater access to agency information than a normal litigant."[246]

The same result was reached in *Barney v. IRS*,[247] a case involving similar facts to those of *Grabinski*, as well as in *Hatcher v. U.S. Postal Service*,[248] *Kacilauskas v. Department of Justice*,[249] and *Peterzell v. Department of Justice*.[250] All of these cases involved various categories of records sought by the targets of enforcement proceedings, where criminal prosecutions were in contemplation. Citing *Robbins Tire*, each of these decisions held that disclosure was barred by Exemption 7(A), either based on the interference caused by "earlier or greater access," or based on several additional categories of interference such as the possibility of intimidation of witnesses, destruction or alteration of evidence, and fabrication of alibis.[251] The categories of records in the above examined cases range from witness statements (whether in affidavits or in summary form), to all manner of correspondence, internal memoranda, and other internal documents created by agency personnel relating to the investigation, handwritten notes of investigators, subpoenas, analyses, worksheets, diary entries, and so on.

In *Steinberg v. Internal Revenue Service*,[252] another FOIA action seeking disclosure of records relating to the IRS's criminal investigation of the plaintiff, the court held the documents at issue to be protected under Exemption 7(A), finding that they fell into the following broad categories:

---

244. *Id.* at 487.
245. *See supra* note 212 and accompanying text.
246. *Grabinski*, 478 F. Supp. at 488.
247. 618 F.2d 1268 (8th Cir. 1980).
248. 556 F. Supp. 31 (D.C. 1982).
249. 565 F. Supp. 546 (E.D. Ill. 1983).
250. 576 F. Supp. 1492 (D.C. 1983).
251. *See id.* at 1495 (citing these additional categories).
252. 463 F.Supp. 1272 (S.D. Fla. 1979).

> (1) internal IRS documents and memoranda regarding audits and investigations; (2) handwritten notes regarding the conduct of the investigations prepared by [the agents assigned to the investigations]; (3) correspondence between the IRS and prospective witnesses in the investigation; (4) grand jury subpoenas and analysis of documents submitted to the grand jury; and (5) correspondence between the IRS and other governmental agencies concerning the conduct of the investigations or containing information regarding targets and witnesses of the investigations.[253]

The court stated that it was "clear . . . that premature disclosure of these records could seriously hamper these ongoing investigations *and prejudice the government's prospective case against the plaintiff and others.*"[254] The court recognized the oft-stated legislative concern that "[f]oremost among the purposes of this exemption was to prevent 'harm [to] the Government's case in court' . . . by not allowing litigants 'earlier or greater access' to agency investigatory files than they would otherwise have (citations omitted)," and rejected the interpretation that *Robbins Tire* was limited to NLRB proceedings.[255] The court noted that "[t]he courts have consistently held that the FOIA was 'not intended as a private discovery tool'."[256] The court also pointed out that the restrictive discovery rules applicable to NLRB proceedings had been analogized to the limitations on criminal discovery,[257] and observed that it could not conceive of any enforcement proceeding where there exists a greater potential for harm than that which may arise from a criminal proceeding.[258] In this regard the court cited the Fifth Circuit's decision in *United States v. Murdock*,[259] which had concluded that "the FOIA was not intended as a device to . . . enlarge the scope of discovery beyond that already provided by the Federal Rules of Criminal Procedure."[260]

253. *Steinberg*, 463 F.Supp. at 1273.

254. *Id.* (emphasis added).

255. *Id.* at 1274.

256. *Id.* (citations omitted).

257. *See id.*; *see also infra* Part IV.C (discussion regarding New York's criminal discovery scheme, and interference with a judicial proceeding).

258. *See Steinberg*, 463 F.Supp. at 1273.

259. 548 F.2d 599 (5th Cir. 1977).

260. *Id.* at 602.

Steinberg's citation to *Murdock* raises an interesting aspect of Exemption 7(A)'s application in the context of a criminal proceeding. *Murdock* was decided by the Fifth Circuit prior to its original, ill-fated *Robbins Tire* decision which was ultimately reversed by the Supreme Court. Significantly, the Fifth Circuit's *Robbins Tire* decision did not purport to conflict with *Murdock*, which the circuit court distinguished *because* the *Murdock* decision involved a criminal proceeding. In that regard, the circuit court specified that "the special dangers that discovery [under FOIA] would pose to a criminal prosecution . . . were so great that Congress could not possibly have intended disclosure."[261] *Murdock* had in fact followed *Title Guarantee*[262] in this regard[263] and the Fifth Circuit's divergence from the "weight of Circuit authority" on this issue[264] therefore never even extended to the realm of criminal proceedings. Thus, in a certain sense, *Steinberg*'s reference to *Murdock* brings us full circle in the inquiry as to whether or not the FOIA may be used as a discovery tool; although the Supreme Court has since answered that question in the negative, the very circuit which initially brought that question to the fore had apparently long before reached the identical conclusion, to the extent that the question involved *criminal* discovery.

Robbins Tire and the subsequent cases construing Exemption 7(A) address a wide range of records including, inter alia, witness statements, all form of internal and external memoranda, correspondence, subpoenas, analyses, worksheets, notes, and diary entries made by investigators related to the investigations at issue. What is thus apparent from these cases is that virtually any category of record which, by its description, is legitimately attributable to a potential enforcement proceeding—and is therefore reasonably subject to any discovery provisions which may govern that proceeding—will be subject to exemption in that "earlier or greater access" to such a record is a legitimate category of interference and, in fact, was a category of specific Congressional concern, both upon the FOIA's original enactment and upon its amendment.[265] Obviously, the records must be shown to relate to the proceeding or to the

261. Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 731 n.19 (5th Cir 1977).

262. 534 F.2d 484 (2d Cir. 1976).

263. *See Murdock*, 548 F.2d at 602.

264. *See also supra* notes 179-80 and accompanying text.

265. Various categories of documents may well be exempt from disclosure pursuant to various other categories of interference. However, it appears that "earlier or greater access" is the category that will *always* apply where a proceeding is potentially in prospect.

underlying investigation. However, where a request itself indicates that it seeks records relating to or created pursuant to the proceeding or the underlying investigation, such a showing is satisfied by the very terms of the request.[266]

C. FOIL's Interference Exemption Under Robbins Tire

1. Criminal Proceedings in New York

As set forth earlier, Article 240 of New York's Criminal Procedure Law governs, generally, the criminal discovery process. A detailed treatment of all of its provisions is unnecessary here.[267] Suffice it to say that the process is a creature of statute, there being no common law authority for a court to compel pre-trial criminal discovery.[268] As such, its parameters are a matter of state legislative policy,[269] although certain constitutional and fundamental fairness requirements have been found to apply.[270] Essentially, the statutory scheme established by the legislature provides a detailed regimen governing the material to be made available under discovery, as well as the time frames within which the material is to be disclosed. "[I]tems not enumerated in article 240 are not discoverable as a matter of right unless constitutionally or otherwise specially mandated."[271]

Pursuant to the statutory scheme, Criminal Procedure Law section 240.20 specifies those items which must ordinarily be disclosed to the defense, pre-trial. The scheme also provides for the availability of a protective order, pursuant to Criminal Procedure Law section 240.50, "denying, limiting, conditioning, delaying or regulating discovery" for a variety of reasons including "the risk of physical harm, intimidation, economic reprisal, bribery or unjustified annoyance or embarrassment . . . ." Moreover, the mere making of a motion for a protective order,

266. *See e.g.*, Barney v. I.R.S., 618 F.2d 1268, 1273 (8th Cir 1980).

267. See Peter Preiser, *Practice Commentaries*, N.Y. CRIM. PROC. LAW § 240.10 (McKinney 1993) for a general overview of the subject.

268. *See id.* at 216 (citing Lemon v. Supreme Court, 245 N.Y. 24, 156 N.E. 84 (1927)).

269. *See id.* (citing W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 20.1 (2d ed. 1992)).

270. *See, e.g.*, PREISER, *supra* note 267.

271. People v. Colavito, 87 N.Y.2d 423, 427, 663 N.E.2d 308, 311 (1996) (citations omitted).

which can be done by *any affected person* (e.g., a witness, a confidential informant, or a law enforcement officer, in addition to prosecutors and defendants themselves) is enough to suspend discovery.[272] Thus, in Article 240, the legislature has recognized the potential harm that unfettered disclosure in the criminal litigation context may entail and has established protective mechanisms (in the form of the article's time frames, as well as its protective order provision) which provide a balance between that harm and the policy of "the fair and effective administration of justice"[273] which Article 240 seeks to promote. As specifically set forth in the Governor's Memorandum approving the enactment of Article 240 in 1979, the statute was "evenly balanced to avoid giving any undue advantage to either side in a criminal proceeding."[274]

Article 240 contains no authority for a court to vary that balance, and where a court attempts to do so, its order will be subject to a writ of prohibition.[275] In *Catterson v. Rohl* and in *Brown v. Appelman*,[276] the Appellate Division granted district attorneys' petitions seeking writs of prohibition as to the discovery orders issued by the respondent-judges, in that the orders had exceeded Article 240's authority. In *Catterson*, specifically, the Second Department not only found that prohibition against the discovery order was warranted, but added that "the gravity of the harm which will be suffered"[277] if the offending order had been allowed to stand "*compels* us to . . . grant prohibition."[278] Thus, the courts recognize and carefully maintain the balance that the legislature has struck in Article 240, and do not lightly allow it to be disturbed or interfered with.

It is against this backdrop that we return to *Robbins Tire*. Not only is *Robbins Tire's* applicability to FOIL indisputable,[279] but it is equally clear that *Robbins Tire*'s analysis—and therefore FOIL's Interference

---

272. *See* N.Y. CRIM. PROC. LAW § 240.50.

273. People v. Copicotto, 50 N.Y.2d 222, 406 N.E.2d 465 (1980).

274. *See* McKinney's Sessions Laws, 1979, pg. 1801, Governor's Memorandum, Chap. 412, L. 1979.

275. *See* Catterson v. Rohl, 202 A.D.2d 420, 423, 608 N.Y.S.2d 696, 699 (2d Dep't 1994); Brown v. Appelman, 241 A.D.2d 279, 284, 672 N.Y.S.2d 373, 377 (2d Dep't 1998).

276. *See id.*

277. *Id. at* 202 A.D.2d at 420, 608 N.Y.S.2d at 696.

278. *Catterson*, 202 A.D.2d at 424, 608 N.Y.S.2d at 699 (emphasis added); *see also* Hynes v Cirigliano, 180 A.D.2d 659, 579 N.Y.S.2d 171 (2d Dep't 1992).

279. *See supra* Part IV.B.1.

Exemption—is applicable as to attempts to use FOIL to circumvent Article 240's restrictions.[280] While the Court of Appeals, in *Gould*, did not find that Article 240 fell within FOIL's Statutory Exemption,[281] it nevertheless cannot be envisioned that the New York legislature, any more than did Congress with regard to FOIA's relationship to the Federal Rules of Criminal Procedure,[282] could have intended FOIL to vitiate Article 240's function as a discovery scheme—thus rendering Article 240 ineffective from its inception[283]—or to overrule the long line of cases dealing with criminal discovery in New York.[284] However, that would be the precise result if it were permissible to use FOIL as a discovery device in a criminal proceeding.

To reiterate the Supreme Court's finding in *Robbins Tire*:

> disclosure . . . would constitute an "interference" . . . [if] a party litigant [receives] earlier and greater access to the [government's] case than he would otherwise have. . . . [A] suspected violator with advance access to the [government's] case could "construct defenses which would permit violations to go unremedied."[285]

Similarly, as the Court of Appeals noted in *Fink v. Lefkowitz*, "[h]owever beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records . . . to construct a defense to impede a prosecution."[286] Thus, pursuant to the Supreme Court's analysis in *Robbins Tire* and its applicability to FOIL, the use of FOIL as a criminal discovery tool is exactly the type of

---

280. *See, e.g., supra* note 258 and accompanying text (clarifying Exemption 7(A)'s applicability to criminal proceedings).

281. *See Gould*, 89 N.Y.2d at 274, 657 N.E.2d at 811.

282. *See, e.g., supra* note 260 and accompanying text.

283. *But see* N.Y. STATUTES § 144 (statutes will not be construed as to render them ineffective); *cf.* Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 710 N.E.2d 1072, 688 N.Y.S.2d 472 (1999) (where the Court rejected the possibility that the legislature could have intended that a statutory scheme—here, Civil Rights Law § 50-a—designed to protect documents from disclosure outside of the specific criteria set forth therein, could be so easily undermined by such facile means).

284. *See, e.g.*, Pittari v. Pirro, 179 Misc. 2d 241, 683 N.Y.S.2d 700 (records relating to a pending prosecution are exempt from disclosure under FOIL, as their release constitutes an interference with a judicial proceeding); *accord* Title Guarantee v. NLRB, 534 F.2d 484, 491 (2d Cir. 1976) (quoted in text accompanying *supra* note 170).

285. *Robbins Tire*, 437 U.S. at 241 (citations omitted).

286. Fink v. Lefkowitz, 47 N.Y.2d 567, 572, 393 N.E.2d 463, 466 (1979).

interference contemplated by N.Y. Public Officers Law section 87(2)(e)(i). Therefore, earlier or greater access to materials than would be available pursuant to Criminal Procedure Law Article 240 is simply not permissible under the exemption.

Finally, while it may be argued that New York's criminal discovery scheme is simply *too restrictive*,[287] this complaint, being one for the legislature to address if it is to be addressed at all, cannot justify interference with that carefully balanced scheme. Significantly, that same criticism had been leveled against the NLRB's discovery scheme.[288] Not only did the restrictive nature of the NLRB's scheme fail to bolster the case for using FOIA as a discovery tool, but it is that very restrictiveness which makes such unintended access an interference.[289] In this regard, the Supreme Court found it to be the NLRB's *duty* to resist efforts to use FOIA to circumvent its discovery scheme.[290] It is difficult to envision how or why the same duty would not be incumbent upon New York law enforcement agencies in the face of discovery-type FOIL requests where a criminal prosecution was in prospect. The Supreme Court in *Robbins Tire* found, however, that the very need to put up such a defense, and its potential impact upon the conduct of the criminal proceeding—in terms of delay—was itself a form of interference as well.[291]

2. The Agency's Burden of Proof

In *Gould*, the Court of Appeals issued its reminder that "blanket exemptions for particular types of documents are inimical to FOIL's policy of open government"[292] with regard to its holding that Complaint Follow-Up Reports are not entitled to blanket exemption as had previously been held in *Scott*.[293] "Instead," the Court noted, "to invoke one of the exemptions of [N.Y. Public Officers Law section] 87(2), the

287. While open file discovery in criminal proceedings exists in some jurisdictions, many a FOIL litigant has bemoaned the absence of such in New York.

288. *See Robbins Tire*, 437 U.S. at 236.

289. *See id.* at 237; *cf. Steinberg*, 463 F.Supp. at 1274 (where the court analogized the NLRB's discovery scheme to that of a criminal proceeding).

290. *See Robbins Tire*, 437 U.S. at 238.

291. *See id.*

292. *Gould*, 89 N.Y.2d at 275, 675 N.E.2d at 811.

293. Scott v. Chief Medical Examiner, 179 A.D.2d 443, 577 N.Y.S.2d 816 (1st Dep't 1992).

agency must articulate a 'particularized and specific justification' for not disclosing requested documents," citing *Fink v. Lefkowitz*.[294] The Court then remitted "for Supreme Court to determine ... whether the Police Department can make a *particularized showing* that any claimed exemption applies."[295] While no such term of art as "particularized showing" was utilized by the Supreme Court to describe the standard set forth in *Robbins Tire*, reconciliation of the *Robbins Tire* standard with the particularized showing requirement is not complicated.

The particularized showing requirement, though not precisely defined in New York case law, was not new when *Gould* was decided. It was first articulated in *Fink*, and was an apparent clarification of an earlier analysis, in *Church of Scientology v. State*,[296] in which the Court of Appeals had rejected "conclusory characterizations" as to the records at issue, regarding which the respondent had failed to tender "*any factual basis* on which to determine whether the materials sought ... come within the exemptions specified in [N.Y. Public Officers Law section 87(2)]." In *Washington Post Co. v. New York State Ins. Dept.*,[297] which was decided subsequent to *Fink*, the Court of Appeals again cited *Church of Scientology*, for the proposition that the claim of exemption made by the respondents in that case had been "presented in the form of *conclusory pleading allegations* ... without the benefit of evidentiary support." The Court therefore found that "[*c*]*onsequently*, the burden of proving that the records should be exempted ... has not been met,"[298] further confirming the proposition for which the *Fink* Court had cited *Church of Scientology* when it coined the term "particularized showing."[299]

Thus, the particularized showing requirement appears simply to call for some factual basis, as opposed to mere conclusory characterizations, upon which a court may find that the materials sought fall within any of the N.Y. Public Officers Law section 87(2) exemptions, and without

294. *Gould*, 89 N.Y.2d at 275, 675 N.E.2d at 811.

295. *Id.* (emphasis added).

296. 46 N.Y.2d 906, 387 N.E.2d 1216 (1979) (emphasis added).

297. 61 N.Y.2d 557, 463 N.E.2d 604 (1984).

298. *Id.* at 567, 463 N.E.2d at 607-08 (emphasis added).

299. An even more recent FOIL decision, which was rendered by the Appellate Division, First Department, also cited Church of Scientology for the particularized showing requirement. *See* Johnson v. New York City Police Dep't, 257 A.D.2d 343, 346, 694 N.Y.S.2d. 14, 18 (1st Dep't 1999).

which a respondent fails to carry its burden of proof.[300] *Fink* therefore provides guidance as to the *nature* of the particularized showing, which is merely that of a threshold evidentiary requirement (in other words, a prima facie showing). A closer look reveals that *Fink* also provides guidance as to the showing's consistency with the *generic category* approach enumerated in *RobbinsTire.*

With all of the hype that surrounds *Gould*, it is all too easy to allow *Fink* to become lost in the background, and to ignore its importance in interpreting FOIL. However, *Fink*, one of the earliest Court of Appeals decisions regarding the amended version of FOIL,[301] provides a useful roadmap to FOIL's interpretation, and one should not fail to recognize its importance in this regard. Specifically, as relates to the burden of proof required for an agency to sustain an exemption (i.e., the "showing"), *Fink* provided three clues. First, of course, was the articulation of the particularized showing requirement itself, against the backdrop of *Church of Scientology*'s rejection of mere conclusory characterizations, as opposed to some factual connection between the record sought and the exemption claimed. Second, *Fink* specifically recognized FOIA as the federal analogue upon which FOIL had been patterned, and articulated the significance of FOIA's case law and legislative history in the interpretation of FOIL.[302] Thus, within the framework of a single decision, the Court articulated the standard to be followed, and then opened the door to an extensive body of case law (pre-existing, as well as prospective) within which to find guidance as to, inter alia, satisfying that standard.

The third clue that the *Fink* Court provided—and the one that ties the other two together, where the Interference Exemption is concerned—is *Fink's* specific citation to *Robbins Tire.*[303] While *Robbins Tire* was cited for a proposition different from that with which we are concerned here—as the *Fink* Court was not construing the Interference Exemption—the Court clearly must have been *specifically* aware of *Robbins Tire*'s content[304] when, after articulating the particularized showing requirement

300. *See supra* note 79 and accompanying text.

301. *See* L. 1977, ch. 933 (effective January 1, 1978).

302. *See* Fink v. Lefkowitz, 47 N.Y.2d 567, 393 N.E.2d 463 (1979). This was one of the most useful pieces of guidance to FOIL's interpretation ever handed down by the Court.

303. *See id.* at 571, 393 N.E.2d at 465.

304. It is axiomatic that citation to a case indicates actual knowledge of its content by the Court.

and then opening the door to the interpretive use of FOIA case law, it cited that particular decision. Certainly, the *Fink* Court was, at the minimum, in *concurrence* with *Robbins Tire*'s analysis when it found that "[h]owever beneficial its thrust, the purpose of the Freedom of Information Law is not to enable persons to use agency records to frustrate pending or threatened investigations nor to use that information to construct a defense to impede a prosecution."[305] In any event, it must be observed that even if *Fink* had not articulated the connection between FOIL and FOIA, nor specifically cited *Robbins Tire*, the parallel nature of the two statutes would still compel the adoption of *Robbins Tire*'s analysis as to the burden of proof required to sustain the Interference Exemption under FOIL.[306] *Fink* simply makes it inescapable that the *Robbins Tire* standard and the particularized showing requirement cannot be anything but consistent with each other.

At this point, we need inquire no further into the scope or nature of the particularized showing requirement under the Interference Exemption or, therefore, *Robbins Tire*'s generic category approach, the consistency between the two being quite clear. However, it is a sure bet that the uncontrollable urge will be generated among some[307] to argue that "generic category" simply equates to a "blanket exemption." Although the ill-defined term "blanket exemption" may thus crop up as a source of additional confusion in this regard, it should be sufficient to observe that the Court of Appeals saw the particularized showing as the very antithesis of the blanket exemption and, therefore, the *Robbins Tire* standard's demonstrated consistency with the particularized showing requirement puts it outside of the reach of such simplistic arguments.

Moreover, just as the New York Court of Appeals found blanket exemptions to be contrary to the legislative intent behind FOIL,[308] the same was true as to Congress's view of blanket exemptions as applied to FOIA, and it was this view that specifically led, in part, to FOIA's 1974 amendment.[309] Yet, the generic category approach was not seen by the Supreme Court as in any way inconsistent with, or violative of Congress's policy against blanket exemptions. Thus, *generic category*

305. Fink v. Lefkowitz, 47 N.Y.2d at 572, 393 N.E.2d at 466.

306. *See supra* Part IV.B.1, for discussion of the parallel statutes doctrine.

307. *See, e.g., supra* notes 101-06.

308. *See Gould*, 89 N.Y.2d at 275, 675 N.E.2d at 811.

309. Which, it will be recalled, served as the model for FOIL's amendment. *See supra* Part IV.B.1.

and *blanket exemption* are, in fact, opposing concepts, and the two were *explicitly* differentiated by the Supreme Court in *Robbins Tire.*[310] Moreover, Congress itself appears to have found no inconsistency between its policy against blanket exemptions and the generic category approach, either. While Congress had not hesitated, in 1974, to legislatively overturn prior Supreme Court case law dealing with Exemption 7,[311] its subsequent 1986 amendment of FOIA[312] —eight years after *Robbins Tire* was decided by the Supreme Court—contained no such disapproval of the Supreme Court's approach, thus indicating its ratification of the Court's interpretation.[313] These two concepts are thus different, and the generic category approach is therefore consistent with Congress's intent as to the fundamental scope and operation of FOIA's Interference Exemption. Based upon the intent of the New York Legislature, that consistency applies to FOIL's Interference Exemption as well.[314] Therefore, the two terms should not be confused or treated interchangeably under either FOIA *or* FOIL.

Finally, a simple look at the usage of the term *blanket exemption,* in the context of both FOIL and FOIA, actually provides a relatively clear picture of what is being described. With regard to FOIL, the term *blanket exemption* was used to describe a situation where a record was held to be exempt simply because it was recorded on a particular type of form (the DD5).[315] With regard to FOIA, Congress used the term to describe a situation where a record was held to be exempt simply because it was contained in an "investigatory file" even where no investigation was in prospect, or where the record did not reasonably pertain to an investigation but had been "commingled" with materials in such a file.[316] Under either statute, an exemption might thus have been claimed even where a particular form or file contained nothing more than a "nursery rhyme." The term "blanket exemption" therefore appears to

310. *See e.g., supra* notes 205 & 206 and accompanying text.

311. *See supra* Part IV.B.2.a.

312. Pub. L. No. 99-570, 100 Stat. 3207-48 (1986).

313. *See* Herman & MacLean v. Huddleston, 459 U.S. 375, 385-86 (1983) ("In light of [a] well-established judicial interpretation [of a statutory provision], Congress' decision to leave [the provision] intact suggests that Congress ratified [the interpretation].").

314. *See* Marx v. Bragalini, 6 N.Y.2d 322, 328, 160 N.E.2d 611, 613 (1959); *see also supra* Part IV.B.1 (regarding the parallel statutes doctrine).

315. *Gould,* 89 N.Y.2d at 275, 675 N.E.2d at 811.

316. *See Robbins Tire,* 437 U.S. at 228-30.

describe the application of an exemption where the record itself is ignored, and its storage medium (whether form or file) becomes the focus—i.e., the "blanket"—capable of forever shielding *any* content from disclosure.[317] This is not the case under the generic category approach, where it is the *content* of a document which drives the exemption.[318]

V. CONCLUSION

One noteworthy aspect of *J.P. Stevens*[319] stems from a certain similarity to *Gould*. *J.P. Stevens* involved the circuit court's construal of the EEOC's claim under FOIA's Exemption 3.[320] Essentially, Exemption 3 protects from disclosure (within certain parameters) records which are specifically exempted from disclosure by another statute.[321] In claiming this exemption, the EEOC had advanced the argument that Title VII,[322] the EEOC's authorizing statute, provided for such exemption and therefore fell within Exemption 3's parameters.[323] The circuit court rejected the EEOC's Exemption 3 claim, though it upheld the claim as to Exemption 7(A). In *Gould,* the Court of Appeals observed that Criminal Procedure Law Article 240 was not an exempting statute within the meaning of N.Y. Public Officers Law section 87(2)(a), FOIL's parallel provision to FOIA's Exemption 3.[324] However, in similar fashion to the decision in *J.P. Stevens,* this did not preclude the *Gould* Court from holding that access to the documents at issue could still be denied under FOIL's Law Enforcement Exemption (within which FOIL's Interference Exemption resides). Also of interest, *Gould* itself dealt with the very problem faced by the 1974 Congress which legislatively overturned the case law that had construed FOIA's Exemption 7 as providing a blanket

317. And that appears to be the gravamen of the Court's displeasure in *Gould*; exemptions based upon form (here, the NYPD's DD5s), as opposed to content, are unacceptable. *See e.g.*, Hanig v. NYS Motor Vehicles, 79 N.Y.2d 106, 111, 588 N.E.2d 750, 754 (1992) ("[T]he relevant inquiry is as to the *nature* of the information, not . . . where it appears . . . .").

318. *Accord Hanig*, 79 N.Y.2d at 111, 588 N.E.2d at 754.

319. J.P. Stevens & Co. v. Perry, 710 F.2d 136 (4th Cir. 1983). *See also supra* Part V.1.B.2.iii.

320. *See* 5 U.S.C. § 552(b)(3).

321. *See id.*

322. Referring to Title VII of the Civil Rights Act of 1964.

323. *J.P. Stevens*, 710 F.2d at 138.

324. FOIL's version of this exemption, however, is less restrictive than FOIA's.

exemption from disclosure for material held within an investigative file. What Congress accomplished by amendment, the New York Court of Appeals accomplished by judicial decision. Moreover, it is clear that both Congress and the New York Court of Appeals deemed their respective offending cases to have been error, and to never have been reflective of the intent of the respective statutes. It is interesting though not surprising that parallel statutes, as their respective case law evolves, experience parallel problems, although their solutions may differ.

At the beginning of this article, several examples of misconception regarding FOIL and *Gould* were presented,[325] along with the observation that precious little direct appellate guidance had (until recently) been available to clarify matters.[326] The analysis contained in this article is designed to "bridge the gap," so to speak, and to end some of the confusion surrounding FOIL and *Gould* that, in the author's experience, still appears to abound. That is not to say that *Robbins Tire*'s applicability to FOIL's Interference Exemption, or the proper application of the particularized showing requirement, have never before been ascertained. In fact, shortly before this article was submitted for publication, the Second Department rendered its decision in *Pittari v. Pirro*,[327]—the first appellate precedent squarely on point as to this issue—adopting *Robbins Tire*'s analysis when it upheld the denial of a criminal defendant's FOIL-based article 78 petition for materials relating to his upcoming trial.[328] Interestingly, the underlying decision also cited *Church of Scientology*—not *Gould* (or even *Fink*)—regarding the government's burden of proof,[329] indicating that court's clear comprehension of the required showing.[330]

---

325. *See supra* Part III.

326. *See supra* note 12.

327. 179 Misc.2d 241, 683 N.Y.S.2d 700, *aff'd*, 258 A.D.2d 202, 696 N.Y.S.2d 167 (2d Dep't 1999), *leave denied*, 94 N.Y.2d 755, 723 N.E.2d 567 (1999). The underlying criminal prosecution involved the notorious murder of the owner of a horseback riding school by one of her former employees.

328. There is, of course, the distinct possibility that subsequent decisions which follow *Pittari* will be appealed to the New York Court of Appeals. A split among New York's Appellate Departments would certainly increase that likelihood. While this issue has, therefore, not yet necessarily been laid to rest in New York, there would appear to be little basis for the Court of Appeals to reject the Second Department's analysis in *Pittari*, if and when such an appeal is heard.

329. *See Pittari*, 179 Misc.2d at 247, 683 N.Y.S.2d at 705. The court agreed with respondent Pirro's assertion as to the dearth of authority in New York case law on the issue of using FOIL as a criminal discovery tool, and rejected the petitioner's claim that

Additionally, even prior to *Pittari*, one other post-*Gould* appellate decision had at least touched on the proper application of FOIL's Interference Exemption. In *Sideri v. Office of the District Attorney, New York County*[331] the Appellate Division, First Department, noted that even disclosure of records which had already been used as evidence at trial would still constitute an interference with the District Attorney's handling of the criminal-defendant/FOIL-petitioner's criminal appeal proceeding.[332] Of some significance, the court was not addressing specific records but was, therefore, referring generally to a *category* of records. Moreover, the full magnitude of this dicta should be clear: if access to materials relating to a criminal prosecution that have already been disclosed (at trial) would interfere with an appeal proceeding, it is axiomatic that an even greater level of interference would be constituted by access to such materials where they had not been previously disclosed at all (such as prior to trial).

Thus, it can no longer be said that appellate decisions regarding the applicability of this exemption to a pending criminal proceeding are unavailable; but their scarcity[333] creates a pressing need for guidance as

---

Gould allowed for such or that it placed any burden upon the respondent beyond proffering "a factual basis for the conclusion that the requested documents come within a statutory exemption" in order to avoid disclosure. *Id.* Relying on *Robbins Tire*'s analysis, the court then denied the petition. *See id.* at 248-51, 683 N.Y.S.2d at 706-08. *Accord*, Brown v. New York City Police Dep't, 264 A.D.2d 558, 694 N.Y.S.2d 385 (1st Dep't 1999), (observing that, where criminal charges against a FOIL petitioner had been pending, denial of all police department records relating to his arrest had been proper, pursuant to FOIL's interference exemption).

330. *Accord* Johnson v. New York City Police Dep't, 257 A.D.2d 343, 694 N.Y.S.2d 14 (1st Dep't 1999) (where the First Department also cited Church of Scientology regarding the agency's burden of proof in a FOIL proceeding).

331. 243 A.D.2d 423, 663 N.Y.S.2d 206 (1st Dep't 1997).

332. *But see* Moore v. Santucci, 151 A.D.2d 677, 543 N.Y.S.2d 103 (2d Dep't 1989) (where the court observed that once a witness testifies in open court, records containing his statements lose their cloak of confidentiality). Though the First and Second Departments may seem to differ on this particular point, the First Department, in *Sideri*, was specifically discussing the Interference Exemption, while the Second Department, in *Moore* (based upon the pre-FOIL authority it cites for this point), may have been speaking of confidentiality in general, thus implicating the confidentiality provision of FOIL's Law Enforcement Exemption (N.Y. PUB. OFF. LAW § 89(2)(e)(iii)) at best. *Moore*'s statement therefore should not be taken as approving "blanket access" to such records. *See supra* Part IV.A.

333. *See, e.g.*, Pittari v. Pirro, 179 Misc. 2d 241, 247, 683 N.Y.S. 2d 700, 704-05, *aff'd* 258 A.D.2d 202, 696 N.Y.S.2d 16 (2d Dep't 1999) (citations omitted) ("The reported decisions on the interplay of the use of FOIL and documents compiled for use in

to the exemption's contours. It is hoped that this article has adequately contributed toward providing some of that guidance. However, the most critical guidance necessary to this, as well as to almost any other issue that may arise under FOIL was in fact rendered long ago in *Fink v. Lefkowitz*. *Fink* opens the door to a wealth of FOIA case law and legislative history, as well as to its application under FOIL. Based upon *Robbins Tire* and a broad spectrum of other FOIA cases, there are likely few issues that can arise under FOIL that have not already been addressed. As noted in this article's preamble, plenty of guidance regarding even FOIL's most contentious issue therefore already exists—one just needs to know where to look for it.

---

a law enforcement investigation and criminal prosecution have primarily dealt with requests for disclosure by individuals whose prosecutions have concluded with their convictions. None of those cases addressed the applicability of Public Officers Law § 87(2)(e)(i) to a pending criminal prosecution."). *Accord* Legal Aid Soc'y v. New York City Police Dep't, 713 N.Y.S.2d 3 (1st Dep't 2000), *appeal denied*, 2000 N.Y. LEXIS 3925 (N.Y. Dec. 21, 2000). Since *Pittari* is precisely on point, however, it is certainly sufficient; and it will remain so unless the Court of Appeals holds otherwise.